Supreme Court, U.S.
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No. -

In The

Supreme Court of the United States

BROCKTON HOSPITAL,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD and
MASSACHUSETTS NURSES ASSOCIATION

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The
District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In March-May, 1997, employee/union member nurses distributed literature at entrances to Petitioner's community hospital, supposedly only to union members, as part of the union's state-wide "Safe Care Campaign. " The literature featured newspaper article copies headlined "A shortcut that killed a patient", "A feeding tube in wrong hands leads to death", "A catastrophe waiting to happen" and "A mistake leads to baby's death." The Hospital offered to print mailing labels so the union could mail the materials; the union rejected the alternative.

The issues presented are:

1. Whether the Board's presumptions that generally prevent a hospital from barring literature distribution outside of "work areas" and solicitation outside of "immediate patient care areas" are rational given the increased acuity and vulnerability of hospital patients and changes in health care since this Court last addressed these issues in *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 98 S.Ct. 2463 (1978) and *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 99 S.Ct. 2598 (1979).

2. Whether a hospital must show actual harm to patients in order to bar distribution of literature or solicitation outside work or immediate patient care areas.

3. Is the above-described distribution of literature, which makes no reference to any labor dispute, protected concerted activity under Section 7 of the National Labor Relations Act, 29 U.S.C. sec. 157.

RULES 14.1 AND 29.6 STATEMENT

Petitioner is Brockton Hospital, a non-profit corporation under Massachusetts law which operates an acute-care community hospital in Brockton, Massachusetts. The National Labor Relations Board is the federal governmental agency charged with enforcement of the National Labor Relations Act, 29 U.S.C. sec. 150 et seq. (the "Act"). The Massachusetts Nurses Association is a labor organization under the Act and representative of the registered nurses employed by the Petitioner; it was the charging party before the Board and an intervenor in the Circuit Court below.

Petitioner has no parent companies nor does any publicly held company own more than 10% of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brockton Hospital (the "Hospital") respectfully requests that this Court issue a writ of certiorari to review the decision of the Court of Appeals for the District of Columbia Circuit, which affirmed in relevant respects the decision and order of the National Labor Relations Board.

OPINIONS BELOW

The decision of the National Labor Relations Board (including the decision of the Administrative Law Judge), 333 NLRB No. 165 (2001), is reproduced in the Appendix at A 1. The decision issued by the Court of Appeals, 294 F.3d 100 (D.C.Cir. 2002) is reproduced in the Appendix at B 1.

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §157 provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all

such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

29 U.S.C. §158(a) provides that it shall be an unfair labor practice for an employer, inter alia:

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [section 157 of this title].

STATEMENT OF THE CASE

The Petitioner, Brockton Hospital ("Hospital"), is an acute care hospital located in Brockton, Massachusetts; The Intervenor, the Massachusetts Nurses Association ("MNA" or "Union"), has been the bargaining representative of the nurses employed by Brockton Hospital since 1980. A 16-17

1. Facts Of The Alleged Unfair Labor Practices.

On March 20, 1997, the MNA sponsored a literature distribution campaign at three entrances to Brockton Hospital – in a glass-enclosed vestibule at the Hospital's main entrance, at the Emergency Room/Outpatient Entrance, and at the "B.K.B." entrance to the Hospital. *Id.* At 18-19. Once a week on Thursdays, for a period of ten weeks, off-duty nurses, some dressed in the Hospital uniforms, distributed literature at 7:00 a.m., 3:00 p.m. and 11:00 p.m. *Id.* The MNA coordinated the distribution as part of its state-wide "Safe Care

Campaign," a political campaign that the Union initiated in an attempt to garner public support for legislative, administrative, and regulatory initiatives. A 17; J.App., Vol. II at 845.[1]

The literature distributed was in large part copies of newspaper articles containing such shocking and sensational headlines as "A shortcut that killed a patient", "A feeding tube in wrong hands leads to death", "A catastrophe waiting to happen" and "A mistake leads to baby's death." A 20-21; B 2-3; J.App., Vol. II at 845-908. Beyond the headlines the literature focused on horror stories - from other hospitals - of patient death and injury due to allegedly unsafe care. *Id.*

The distribution campaign "became very visible to the public eye" according to the union. J.App., Vol. II at 845-908. The commencement of this distribution coincided with a visit by the Massachusetts Department of Public Health and then-Massachusetts Governor William Weld. J.App., Vol. II at 1049-50. Significantly, the MNA purposely chose throughout its campaign not to distribute at the Hospital's "Employee Entrance" which is used exclusively by employees, including many nurses; the MNA was pleased that their activities "made an impression". J.App., Vol. I at 355, 369-70, 741-743; Vol. II at 1050.

Off-duty nurses distributed multiple copies of the literature to their co-workers. J.App., Vol. I at 244-245. In

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1 Citations made to the "J.App." in this section of the petition refer to the Joint Appendix before the Circuit Court for the District of Columbia. Some of the facts relevant to this case did not expressly make their way into the Administrative Law Judge's opinion or that of the Board.

addition, they placed the literature in nurses' mailboxes on nursing units and distributed the literature in the Hospital cafeteria, as they had planned. J.App., Vol. 1 at 239; Vol. II at 1048-49. Hospital personnel found the literature in various locations throughout the Hospital over the course of the MNA's campaign. A 22-23; J.App., Vol. I at 430, 539-540. The Hospital President testified that the distribution generated a good deal of discussion with staff, who reported that patients were wondering what was going on, and that the Hospital had to develop and implement a communications plan to share with patients what was going on. J.App., Vol. I at 430.

In response to the Union's campaign, the Hospital requested that the MNA refrain from distributing this literature at the entrances to the Hospital. A 20; J.App., Vol. II at 915. The Hospital offered to provide the MNA with mailing labels, as the Hospital has done in the past, so that the MNA could mail this literature to its members, but the MNA refused. A 22. The MNA subsequently resumed distribution in the vestibule area of the lobby for the remainder of its campaign. A 20.

A. The Vestibule.

The Hospital considers the vestibule a part of the main lobby. The ALJ stated from the bench that it was "obvious" to him that the lobby was a work area. J.App., Vol. II at 387.

The vestibule is a glass-enclosed area bounded by two sets of glass double doors and having partial glass walls on its sides looking into the lobby of the Hospital. A 23. Both sets of doors are occasionally left open, depending on the weather, and were installed as a means of climate control for the lobby area. J.App., Vol. I at 336, 383. The vestibule is approximately fifteen feet wide and

ten feet in length. J.App., Vol. I at 1093. The Hospital maintains benches in the vestibule for the comfort of patients, their families and visitors, as well as for employees. A 23.

The vestibule is located at the main entrance to the Hospital and is in continuous use beginning at 6:00 a.m. and continuing throughout the day. A 23; J.App., Vol. I at 388, 658-59, 739-40. Patients and their families frequent the vestibule. For example, Transitional Care Unit patients may leave the inpatient unit and often sit on the benches in the vestibule. *Id.* At 660-62. Similarly, psychiatric patients, accompanied by Hospital staff, often utilize benches immediately outside of the vestibule. *Id.* at 395, 594-596.

Approximately 85% of all discharged patients exit the Hospital through the vestibule. *Id.* at 543-44, 704. Discharges through the vestibule occur at all hours of the day, though typically between 9:00 a.m. and 11:00 p.m. *Id.* at 552. Transport staff regularly assist patients to and wait with them in the vestibule upon discharge. A 23.

In the Spring of 1997, the lobby was the only waiting area for family members of surgical patients. J.App., Vol. I, 658, 675. It is a common occurrence for doctors, often dressed in surgical garb, to confer with patients' families in the lobby area after surgical procedures regarding the patients' prognoses. J.App., Vol. I at 639-40, 658, 675, 705.

The first floor of the Hospital encompasses numerous areas where both inpatients and outpatients receive medical treatment, are diagnosed, or are administered medical tests. *Id.* at 321-329. Hospital staff transporting inpatients to treatment areas on the first floor travel through the lobby; similarly, outpatients often travel through the vestibule and the lobby to reach treatment areas. *Id.* at 322, 328, 541.

2. The Changing Face Of Healthcare And Hospital Patients

A. Patients Generally Are Sicker And More Vulnerable Than In The Past

All the witnesses testifying on the issue stated that hospital patients generally are sicker - or more "acute" - than in the past, including the Union's main witness regarding the "Safe Care Campaign," Ms. Francis. A 17-18. Some of the literature handed out by the union also supported this claim statistically. For example, in General Counsel Exhibit 10(b), in part the results of a survey of nurses, 76.7% of reporting nurses reported more or much more patient acuity in just the past year (1995 to 1996). J.App., Vol. II at 849. As Ms. Francis, an associate director for labor relations of the union, testified:

> When patients are admitted to the hospital under the managed care system, they must be extremely ill. Frequently, when the come in, they have many systems that are failed, it is not just - you don't come in and just have an appendix, if you do you're in and out the door in one day, many more surgeries are done on an outpatient basis, okay, things have changed dramatically, in the last five years. A patient who is extremely ill requires more attention from the registered nurse and as a result of that, the nurse is tied up more at the bedside when it's possible to be there, than normally, we would be used to in a hospital situation, the last five years have been very, very difficult. In addition to that, aside from the patient acuity and the need for the nurse to be there, there is a

> constant turnover of patients because under managed care, you must get in and get out as fast as possible and frequently, patients are sent home, not the hospital's fault, but patients are sent home sooner than they need to be, into home care situations that also require support, nursing support, and they come back through the door much faster, so we're starting with a sicker population to begin with.

J.App., Vol. I, 79-80; A 18.

A 1999 study by the Institute for Health & Socio-Economic Policy further documents the increasing acuity of in-patient admissions. In a study of patient acuity data encompassing 18,200,000 discharges in California in 1993-1997, the Institute found that "[a]verage patient acuity levels rose between 1993 through 1997, from an average of 1.69 to an average of 1.79 on a four-point scale." *California Health Care: Sicker Patients, Fewer Rns, Fewer Staffed Beds*, at 3, 10-11 (September, 1999). The Report also found that "[a]cuity levels are projected to increase 30% by the year 2025 - from an average of 1.75 (high Minor rating) to more than 2.5 (mid Moderate rating)." *Id.*

In two other key findings, the Institute found that "the Major acuity rating (the second most severe rating) has increased a full 2.2% while the Extreme acuity rating (the most severe rating) has increased by about 1%. This is an increase of 3% in the more serious acuity ratings." *Id.* Finally, "Minor acuity ratings decreased from 52.3% of all California patient discharges to 46.5% for a 5.8% drop." *Id.* Put somewhat more coarsely, sicker people go into the hospital, and sicker people come out, trends which according to the institute are expected to continue for at least the next 20 years.

This information is consistent with other available

data. For example, average length of patient stay in community hospitals has decreased from 7.8 days in 1973 to 6.2 days in 1996. 1998 Data Compendium, Health Care Financing Administration, at 73. This decrease correlates with a dramatic increase in the number of outpatient visits, from 173,000,000 in 1973 to 440,000,000 in 1996. *Id.* Moreover, the 65+ year old population of the United States has risen steadily from 1990 through 1997, *id.* at 51, and is expected to almost double between the years 1995 and 2025, from approximately 51,000,000 to approximately 92,000,000 individuals. *Id.* at 52.

As a result of this dramatic change in healthcare delivery, the public has developed an increasingly negative perception of the quality of care, and questions whether the delivery of quality patient care is of primary importance. J.App., Vol. I at 498-99.

B. The Level Of Trust Between Patient And Healthcare Provider Is Important To Patient Outcomes

During the same time period that the delivery of healthcare has undergone such dramatic changes, the medical community has come to realize even more acutely that effective patient care involves numerous variables beyond discrete medical procedures. A 11, 46-47; J.App., Vol. I at 485-489. One important variable is the level of trust between the patient and the healthcare provider. *Id.* The level of trust between the patient and the healthcare provider is important to the patient's ultimate medical outcome because the level of credibility that a provider possesses directly correlates to the level of communication between the patient and the provider. *Id.* When there is a positive trust level, the patient will likely be more forthcoming about the extent, severity and symptoms of

an illness, as well as any concerns that the patient may harbor. *Id.* Complete and accurate information enables healthcare professionals to make a more accurate assessment about the nature of the illness and the prescribed course of treatment. *Id.* At the same time, the patient is more likely to adhere to a prescribed treatment regiment when he or she trusts the medical professionals. *Id.*

C. Increased Stress And Anxiety Contribute To Adverse Health Effects

Another significant variable in patient care is the level of stress and anxiety that patients experience. A 11, 46-47; J.App., Vol. I at 485-499, 572-599. Empirical studies have established a direct correlation between increased levels of stress and anxiety on the one hand, and deteriorating health on the other. *Id.* Stress can also negatively impact a patient's immune system, thereby increasing recuperation time and susceptibility to illness and complications. *Id.* Finally, stress and anxiety have been found to exacerbate illnesses. *Id.*

Finally, a patient's overall emotional and psychological condition can have a profound effect on his or her ability to recover from an illness or medical condition. *Id.* The patient's emotional and psychological condition of a patient also is, to an important extent, dependent upon the level of support the patient receives from family and friends during times of crisis. *Id.* To the extent those individuals express fear, doubt or stress about the patient's condition, ability to recover or quality of care, those emotions can negatively impact the patient's emotional state and, consequently, his or her recovery abilities. *Id.*

D. The Union's Literature Would Have Deleterious Effects On Patients And Their Providers

The medical experts (acknowledged as such by all parties) unanimously agreed that healthcare providers' responsibilities to their patients extend well beyond the immediate clinical care administered to patients, and requires that they provide a sheltering, nurturing environment that promotes trust and remains as free from stress and anxiety as possible. A 21. All three experts agreed that if patients were exposed to the literature distributed by the union at the Hospital, that literature would have a deleterious effect upon the patients' medical well-being and their overall health. *Id.*; J.App., Vol. I at 490-93, 579-582, 698-99. This literature would necessarily create stress and anxiety in these patients regarding the quality and effectiveness of the care that they would receive at Brockton Hospital, exacerbating the already extremely stressful situation of entering or being admitted to a hospital to undergo either medical tests and/or treatment. *Id.* Also, the literature could exacerbate the decreasing levels of trust in healthcare providers, thus causing deleterious effect on the overall care provided to patients at the facility. *Id.*

The experts further agreed that, although the literature does not specifically mention Brockton Hospital, patients, their families and visitors would logically conclude that the inadequate and unsafe conditions at hospitals described in this literature existed at Brockton Hospital; this is because the literature is qualitatively different from articles appearing in their normal context, such as a newspaper, as it was specifically excerpted, copied and distributed at the Hospital. J.App., Vol. I at 624-25, 747-53. Moreover, in the hands of patients'

families and visitors, this literature could have deleterious effects upon the health of patients as the stress, anxiety and emotional state of those individuals is conveyed to the patient with whom they are in contact. *Id.* at 577-78, 700-701. Finally, this type of literature could have deleterious effects on the patient through the health care provider to whom it had been handed, because that nurse should be transmitting confidence to the patient, and recent exposure to such information could compromise that confidence. A 21; J.App., Vol. I at 581.

Thus it is undisputed in this case that the population admitted to acute care community hospitals in this day and age is much more acutely ill, and is allowed fewer days of in-patient treatment which naturally results in discharged patients being sicker when discharged than was the case when both *Beth Israel* and *Baptist Hospital* were decided in the late 1970s. Enhanced awareness of the recovery process also indicates that an atmosphere of peace and quiet is even more important than previously believed.

3. The Rulings Below

The Board found that the Petitioner violated Section 8(a)(1) of the Act by (1) barring literature distribution at the three entrances and (2) maintaining "overly broad" distribution and solicitation bans in it policies and employee handbook. A 1-4. The Board also found that the distributor's conduct was protected concerted activity under the Act. A 1, 24. The Circuit Court of Appeals for the District of Columbia affirmed the Board's rulings in relevant part. B 2-13.

REASONS FOR GRANTING THE WRIT

I. Review Is Warranted Because The Provision Of Health Care Has Changed Dramatically Over The Past 20 Years, And The Board's Presumptions And Distribution/Solicitation Rules For Hospitals Have Not.

The Board's intransigence in adapting to the dynamic environment of health care, together with its total lack of expertise in the medical arena, have contributed to a situation in which the Board holds that a hospital cannot bar the distribution of scandalous and shocking literature in areas which patients and their families frequent. Petitioner respectfully suggests that this result is not the result of a rational interpretation of the Act.

Even in *Beth Israel v. NLRB*, 437 U.S. 483, 98 S.Ct. 2463 (1978) and *NLRB v. Baptist Hospital*, 442 U.S. 773, 99 S.Ct. 2598 (1979), this Court was unanimous only in the judgment, not in the underlying rationale, which was badly splintered in both cases. Some justices believed that all distribution/solicitation should be banned in hospitals. All Justices agreed, however, that to be supportable a presumption cannot rest on grounds which are irrational. More important, however, is the admonition to the Board made in *Beth Israel* and strongly reiterated in *Baptist Hospital*, imposing an obligation on the Board to be particularly cognizant of the distribution/solicitation issues arising in the health care environment.

It also should be noted that *Baptist Hospital* expressly involved union organizing, and *Beth Israel* appears to have involved organizing. Here, however, this is not a situation where the union was attempting to gain a foothold in the institution, but a situation where the union already represents employees and the parties had a

collective bargaining agreement in place.

In *Beth Israel*, this Court upheld the Board's presumption that healthcare facilities may lawfully ban employee solicitation and distribution only in "immediate patient care areas." 487 U.S. at 495, 507; see also *Baptist Hosp.*, 442 U.S. at 779 ("[t]he scope of the Board's presumption depends upon the definition of the phrase 'immediate patient care areas'"). However, the Court also noted that:

> [The] Board [bears] a heavy continuing responsibility to review its policies concerning organizational activities in various parts of hospitals. Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial settings with which the Board is more familiar. The Board should stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact in jeopardy.

Beth Israel Hosp., 437 U.S. at 508. This Court subsequently offered further guidance in this area:

> The Board, in reviewing the scope and application of its presumption, should take into account that a modern hospital houses a complex array of facilities and techniques for patient care and therapy that defy simple classification. Patients not undergoing treatment at the moment are cared for in a variety of settings -- recovery rooms, intensive-care units, patients' rooms, wards, sitting rooms, and even corridors, where patients are often encouraged to walk, or to visit with their families.

Baptist Hosp., 442 U.S. at 790, n. 16.

In fact, the majority in *Baptist Hospital* stated that "[i]t must be said, however, that the experience to date raises serious doubts as to whether the Board's interpretation of its present presumption adequately takes into account the medical practices and methods of treatment incident to the delivery of patient-care services in a modern hospital." *Baptist Hospital*, 442 U.S. at 790.

Under the Board's current presumption/policy, as articulated by the ALJ, the Hospital may ban literature distribution only in work areas, regardless of the effect on patients (or potential effect on patients) of literature distribution in other areas, unless the Hospital can show an actual deleterious impact on patients. A-?.

In more than twenty years of experience since the Court's command in *Beth Israel*, supra, the Board has not altered its restrictive interpretation of the definition of "immediate patient care areas." In 1976, the Board first defined "immediate patient care areas," by illustration only, to include areas, "such as patients rooms, operating rooms, places where patients receive treatment, such as x-ray and therapy areas." *St. John's Hosp.*, 222 NLRB 1150 (1976). To date, that restrictive interpretation has remained remarkably static. See, e.g., *Doctors' Hosp. of Staten Island*, 325 NLRB 730 (1998) (defining immediate patient care areas as the Board initially determined in *St. John's Hosp.*).

Only to the extent this Court has forced its hand has the Board expanded its interpretation of "immediate patient care areas." See *Baptist Hosp.*, 442 U.S. at 788 ("The evidence of record in this case and other similar cases does, however, cast serious doubt on a presumption as to hospitals so sweeping that it embraces solicitation in the corridors and sitting rooms on floors occupied by patients."). In his dissent in the present case, Board

Member Peter J. Hurtgen accurately described the Board's failures in this area:

> My colleagues states that the balance struck by the Board in this are in of the law has stood the test of time. That is certainly true in the sense that the Board has declined to abandon or modify the presumptions at issue. However, the question is whether the times have changed so that the Board should reevaluate its policies, just as the Supreme Court has suggested it should...I believe that the Board should do so.

A 12.

Moreover, "immediate patient care areas" are an artificial creation of a Board with no expertise in the medical field. Patient care is a much broader concept than discreet medical procedures or treatments. Patients need peace of mind throughout the entire institution, and the sicker patients of 2002 need peace of mind even more than the patients of 1979. They need it when they walk in, they need it while they are there, and they need it on their way out. It is the whole environment of the hospital which is important, and it is a Board fiction to carve out one or another small discrete area and say that there can be distribution here but not there, solicitation here but not there.

The Hospital submits that restrictions on solicitation/distribution should be presumptively lawful in all areas of a hospital's premises to which patients and their families or friends have regular access.

Therefore, the Petitioner believes that it is time this Court revisited the issue of union distribution and solicitation in acute-care hospitals, and that it is appropriate in this day and age to allow a hospital to bar

union literature distribution and solicitation in any hospital area to which patients have access or are present with any reasonable degree of regularity. In *Beth Israel,* after all, one of the critical facts was that use attributable to patients of the cafeteria in question was less than 1.7%. 437 U.S. at 490. The Court plainly indicated that heavy patient use or presence would have dictated a different result in that case. *Id.* at 502 ("It is of critical significance that only 1.56% of the cafeteria's patrons are patients.")

II. Review Is Warranted Because The Board And Court Below Appeared To Require The Hospital To Demonstrate Actual Harm To Patients In Order To Justify Stricter Bans On Distribution

In *Baptist Hospital,* this Court upheld a no-solicitation/distribution rule applicable to patient sitting rooms and corridors although the ALJ, in the first instance, found that the testimony by physicians regarding the possible disturbance of patients "was directed to *possible* effects of union campaigns and was given pursuant to certain hypothetical questions." *Baptist Hospital,* 223 NLRB 344 (1976). According to this Court, a hospital bears the burden of proving only that "solicitation *may* adversely affect patients." *Baptist Hospital.,* 442 U.S. at 782 (emphasis supplied).

Here, the Hospital presented the same type of evidence, included expert witnesses accepted by both the union and the General Counsel as experts, but both the Board and the Court effectively ruled that because there was no evidence any patient *actually* received the distributed literature, the Hospital somehow had failed to carry its burden. A 1, 22, 28; B 4-7.

This result is in direct contravention of this Court's requirement in *Baptist Hospital.,* 442 U.S. at 782, that the

Hospital need only show that the conduct at issue may adversely affect patients. The Court of Appeals below appeared to apply a different standard, that a hospital must show a "likelihood of patients being disturbed." B 5-6. Yet the undisputed testimony, the ALJ's finding, the Board's ruling and the Court below's ruling, all agreed that exposure of this literature to patients would be harmful to patients. But then the ALJ, the Board and the Court below went on effectively to rule that the Hospital still had not carried its burden under *Baptist Hospital* because here there was no evidence of actual receipt of the distributed material by a patient.

Moreover, even if the union did attempt to limit distribution, the very nature of a small, congested community hospital means that everyone knows there is something going on by the front door, employees and patients ask questions of management, and the literature floats around the institution.

Literature in fact was found scattered in many places throughout the Hospital, and patients were asking what was going on. Thus the fact of the distribution had been brought to patients' attention. To quell patients' curiosity about what was going on, the Hospital had to develop and implement a communication plan for patients so they would know what was going on, futher emphasizing the union's distribution.

The result in this case should not be allowed to stand, for both this Petitioner and for every other Hospital in the country. To require the Petitioner, or any other healthcare facility, to await actual harm (or at least actual exposure) to a patient before it may lawfully prohibit distribution or distribution activities is both senseless and dangerous, and certainly is not dictated by the Act nor is a rational interpretation of the Act. This is a decision badly in need of review by this Court.

Thus the Petitioner respectfully requests that its petition be granted.

III. Review Is Warranted Because The Scare Tactics Used By The Union Should Not Be Considered Protected Concerted Activity Under The National Labor Relations Act In A Hospital Environment.

The Board and Circuit Court's ruling that it is protected concerted activity to distribute materials of the nature discussed in this case at the main entrance of an acute-care community hospital is a perversion of the Act, and certainly not a rational interpretation of it.

A union cannot distribute anything it wants and seek shelter behind the protections of §7 of the Act. There are limits. In fact, the Act itself is very specific. Section 7 protects employees' right

> to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid and protection.

29 U.S.C. §157. That is all it protects. Activity outside of the §7 description is not protected and employer action based on unprotected activity thus cannot form the basis of an unfair labor practice.

This Court has held that the "mutual aid and protection" clause - at its maximum reach - protects employees who "seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565, 98 S.Ct. 2505, 2512 (1978). In *Eastex*, employees circulated a newsletter which criticized a Presidential veto of a minimum wage increase and advocated against a state

right-to-work constitutional provision. This Court ultimately upheld the Board and ruled that the newsletter was a protected activity because the topics implicated the employees' interests as employees. "Few topics are of such immediate concern to employees as the level of their wages," noted the Court, reasoning that a rise in the minimum wage may impact negotiated settlements. *Id.*, 437 U.S. at 569-570. Opposition to a state constitutional right-to-work provision also was an attempt to protect the employees' interests as employees, since it impacted on whether shops could be open or closed. *Id.*

Yet the *Eastex* Court also noted that "some protected activity bears a less immediate relationship to employees' interests as employees than other such activity," and that the relationship becomes so attenuated at some point that "an activity cannot fairly be deemed to come within the `mutual aid or protection' clause." 437 U.S. at 567-568. Thus even *Eastex* limited "mutual aid and protection" to activity that would "improve [employees'] lot as employees." 437 U.S. at 566-567; accord *NLRB v. Local 1229, International Brotherhood of Electrical Workers (Jefferson Standard)*, 346 U.S. 464, 476-477, 74 S.Ct. 172, 178-179 (1953)(circulation of handbills that criticized the quality of the employer's television broadcasts was not protected concerted activity).

As the 2nd Circuit subsequently noted:

> . . . the Board may not broaden Section 7 to protect activities which have no bearing on the employment relationship. The entire Act revolves around the protection of workers' efforts to better their working conditions through collective action. Nothing in the Act can be understood without keeping this central point in mind. . . . the Act does not protect any "union activity" engaged in by an

employee if it is unrelated to the terms and conditions of employment. Although this discussion seems obvious, it is clear that the Board ignored this commonsensical approach to the Act in this case.

Office and Professional Employees International Union v. NLRB, 981 F.2d 76, 82 (2nd Cir. 1992); see also *Ford Motor Company*, 221 NLRB 663 (1975)(distribution of a purely "political" newsletter was beyond the bounds of activity envisioned by the mutual aid or protection clause).

Moreover, where such conduct makes "no reference to the union, to a labor controversy or to collective bargaining" by "purport[ing] to speak . . . in the interest of consumers and the public at large," such conduct is unprotected. *Jefferson Standard*, 346 U.S. at 471-72; see also, e.g., *Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 217 (9th Cir. 1989), *enf'ing* 291 NLRB 540 (1988)(letter protected as it was "unambiguously" related to a labor dispute; written on union letterhead, signed by union members, and referred to failed contract negotiations); *San Juan Hotel Corp.*, 289 NLRB 1453 (1988) (Leaflet protected as it was addressed "to all employees" and referred specifically to abuses "against us employees" and to "wages").

The rhetoric and hyperbole associated with labor disputes will be protected if such an express link exists because those "who receive appeals for support in a labor dispute will filter the information critically *so long as they are aware it is generated out of that context.*" *Sierra Publishing Co.*, 889 F.2d at 217 (Emphasis added). Moreover, where "the natural and foreseeable consequences of [a communication's] issuance [is] that it would serve as a communication to the public . . . the preparation and issuance of that document must be analyzed in that light."

See *Greyhound Lines, Inc.*, 251 NLRB 1638 (1980).

The literature distributed by the union at Brockton Hospital had nothing to do with the terms and conditions of employment of Brockton Hospital nurses. It was in express furtherance of the union's state-wide political "Safe Care Campaign." J.App., Vol. II at 845. It began on the very day of the Governor's planned visit, and obviously was calculated to generate publicity and discussion and to make an impact, as union members gleefully acknowledged it did. J.App., Vol. II at 1050, 1052 ("Plus we became very visible to the public eye . . . ")

None of the literature asserted any labor dispute, or any issue that the union had with the Petitioner. There is no claim that any of the disasters outlined in the literature ever happened at the Hospital. There was no evidence that the distributors themselves were instructed by the union to inform the recipients that this material was in preparation for negotiations, though some may have done so of their own accord. A bargaining unit member handed this material with no explanation would have no idea what it was for or about other than disparaging the Hospital.

The Board and Circuit Court's interpretation of the Act is not rational and does not further the goals of the Act. An interpretation of law that allows union distribution of reprinted newspaper articles with headlines like "A shortcut that killed a patient", "A feeding tube in wrong hands leads to death", "A catastrophe waiting to happen" and "A mistake leads to baby's death," at the front door of the local community hospital needs to be reviewed and rethought. It appears that the Board has lost some perspective in this situation, and has inappropriately balanced the Section 7 rights of the Hospital's employees with the rights of its patients by using a brick on the one hand and a feather on the other.

Petitioner does not believe that the Board and the Circuit Court are correct in their interpretations of this Court's cases dealing with the far reaches of "protected concerted activity." The type of union activity in this case, conducted in a hospital environment, ought not to be countenanced under the Act. If the Board's distribution and solicitation rules must be different in the health care area, as this Court already has dictated, then the rules governing what conduct is permissible in and around a hospital similarly ought to be different, and more restrictive.

The Petitioner urges this Court to impose some order and clarity - and sanity - on the outer limits of protected concerted activity under the National Labor Relations Act.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted.

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September 26, 2002

APPENDIX A

National Labor Relations Board

Brockton Hospital and Massachusetts Nurses Association.
Cases 1-CA-35136 and 1-CA-35875
May 11, 2001
DECISION AND ORDER

By Chairman Truesdale and Members Hurtgen and Walsh

On March 25, 1999, Administrative Law Judge Martin J. Linsky issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, answering briefs, and reply briefs.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as modified and to adopt the recommended Order as modified.[4]

1. For the reasons stated by the judge, we agree that the Respondent violated Section 8(a)(1) by prohibiting the distribution of union literature in the vestibule adjacent to its front lobby.[5] The General Counsel has excepted to the judge's failure to address a separate complaint allegation that the Respondent prohibited such distributions anywhere on its premises. In support of this exception, the General Counsel cites testimony by employees Terry

Corcoran, Rinette Nadeau-Bates, Barbara Cooke, and Carolyn Anderson that they were told, by supervisors and agents of the Respondent, that they could not distribute their literature on hospital property. This testimony was disputed by the Respondent's witnesses, who testified that they only directed employees to stop distributing the disputed literature in the vestibule.

The judge did not explicitly address this complaint allegation in his decision. However, the judge did note that there was a question in this case whether the nurses had "been told that they could not distribute the literature on Hospital premises." After noting the existence of this issue, the judge proceeded to find that Nurse Manager McArthur told Corcoran and Nadeau-Bates to "'cease and desist' from handing out literature in the front vestibule." (Emphasis added.) Likewise, the judge found that the Respondent's president, Goodman, told Cooke and Anderson "that they could not distribute literature in the vestibule" without a court order. (Emphasis added.) In these circumstances, we find that the judge implicitly credited the testimony of the Respondent's witnesses over that of the General Counsel's witnesses with respect to this issue.[6] Accordingly, in the absence of any credited testimony that the Respondent banned all distribution of the disputed literature on its premises, we shall dismiss this complaint allegation.

2. The judge found, inter alia, that the Respondent violated Section 8(a)(1) by maintaining an overly broad no-solicitation/no-distribution policy in its 1994 Associate Handbook. That policy, in full, provides that

> Associates shall not canvass, solicit, or distribute literature for any purpose during an associate's working time or the working time of the associate

at whom such activity is directed.

Working time is defined as those periods in which an associate is scheduled or assigned for duty. It does not include authorized lunch time.

Canvassing, soliciting or distributing literature may not occur at any time in patient rooms, halls and corridors used by patients, treatment areas, patient lounges and other areas where patients receive treatment.

Canvassing, soliciting or distributing literature on hospital premises by non-associates is prohibited.

In his decision, the judge addressed only the first two paragraphs of this policy. The judge found that this language was overly broad because it does not specifically exclude breaktimes from the definition of working time. We do not agree with this finding.

In *Our Way, Inc.*,[7] the Board held that a rule against solicitation or distribution of literature during "working time" is presumptively lawful, and will not be condemned as ambiguous merely because the term "working time" is not expressly defined for employees. Thus, the term "working time" "connotes periods when employees are performing actual job duties, periods which do not include employees' own time such as lunch and break periods."[8] In *Jay Metals*,[9] the Board found that the employer's rule prohibiting solicitation and distribution of literature during "working time" was lawful even though the employees took short breaks as their work schedule permitted and were paid for their lunch and breaktime. The Board recognized that,

> [t]o the extent, however, that the Respondent releases employees from their duties for lunch or other breaks, it would be inconsistent with Our Way to infer that the Respondent's no solicitation/no distribution rule would apply to such periods—or that employees might reasonably think that it did—merely because employees are paid for such periods or because the breaks are informally scheduled and may not overlap with the breaks of other employees.[10]

Consistent with these principles, we find that, under the circumstances of this case, the Respondent's employees likewise would not reasonably believe that the prohibition against solicitation or distribution of literature during "working time" would apply to break periods merely because the policy specifically excludes "authorized lunch time" but does not also specifically mention "breaktimes."

As noted above, the judge addressed only the first two paragraphs of this policy in his decision. In agreement with the General Counsel's exceptions, we hold that the third paragraph of the policy is overly broad insofar as it prohibits any solicitation or distribution of literature in "halls and corridors used by patients." The judge found that substantially identical language, in the Respondent's Administrative Policy Manual, violated Section 8(a)(1) because its blanket prohibition extends beyond immediate patient care areas.[11] We adopt this finding, for the reasons stated by the judge, and we find the similar prohibition, in the Associate Handbook, against solicitation or distribution of literature in "halls and corridors used by patients" likewise violates Section 8(a)(1).

Our dissenting colleague acknowledges that the Respondent's no-solicitation/no-distribution policies are

unlawful under well-established precedent. The dissent argues that the Board should overrule that precedent and allow hospitals to prohibit solicitation and distribution "in areas where patients, their families, and visitors spend a substantial amount of time." In the dissent's view, such prohibitions—including the Respondent's policies set forth above—are presumptively lawful because solicitation or distribution of literature in those areas could interfere with a hospital's ability to care for its patients.[12]

We adhere to the Board's established precedent. Under that precedent, a hospital's prohibition of solicitation or distribution of literature in immediate patient care areas, even during employees' nonworking time, is presumptively lawful.[13] Restrictions on solicitation, during nonworking time, or distribution of literature, during nonworking time and in nonworking areas, however, are presumptively unlawful even with respect to areas that may be accessible to patients.[14] The Supreme Court has upheld these presumptions as consiste[15] and we find no support in the record of this case for departing from these well-settled principles.

We stress that what is at issue is the facial validity of the Respondent's policies. As set forth above, the Associate Handbook and the revised Administrative Policy Manual ban any solicitation or distribution of literature in areas beyond those which the Board has found to be immediate patient care areas. On its face, the revised Administrative Policy Manual would even place off limits all areas of the hospital used by patients, however infrequently, including the Respondent's gift shop and cafeteria and its vestibule area. The Board has, with court approval, consistently found that such sweeping limitations on employees' Section 7 rights are facially unlawful.[16] Our colleague appears to concede

that the Respondent's policies would be presumptively unlawful under his approach as well.[17]

We of course agree with our colleague that an "atmosphere of serenity" is a desirable goal in the hospital setting. The Board's presumptions regarding restrictions on solicitation and literature distributions by hospital employees reflect a careful consideration of the interests of patients, as balanced against the interest of employees to exercise their Section 7 right "effectively to communicate with one another regarding self-organization at the jobsite."[18] As the Supreme Court has recognized,

> Here, as in many other contexts of labor policy, "[t]he ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review."[19]

The balance struck by the Board has stood the test of time, and we are not persuaded that there is any need to reexamine that balance for the purpose of deciding this case.

3. For the reasons stated by the judge, we agree that the Respondent violated Section 8(a)(1) by removing a handwritten notice posted by employee Wendy Baron on her locker concerning an upcoming union meeting at Baron's home.[20] The judge additionally found that the Respondent violated Section 8(a)(1) when Supervisor Carla McRae told Baron that the handwritten notice was "unprofessional." Contrary to the judge, we find no evidence to support a finding that this comment

reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Baron testified that McRae told her that she should have had the notice professionally prepared and then submitted it to McRae, or Supervisor Sue Davis, who would determine whether, and where, it could be posted. Viewed in context, we find that this comment refers only to the fact that the notice was handwritten, rather than professionally prepared, and cannot reasonably be construed as a characterization of Baron's union activities as unprofessional.[21] While McRae's opinion concerning the appearance of Baron's notice may have been gratuitous, as the judge found, there is no basis, under the circumstances of this case, for concluding that it thereby violated Section 8(a)(1).[22]

Amended Conclusion of Law
Substitute the following for Conclusion of Law 3(d).
"(d) When it discriminatorily enforced a policy of removing union notices from a nurse's locker while permitting other material to be posted on nurses' lockers."

ORDER
The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Brockton Hospital Brockton, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(d).
(d) Discriminatorily enforcing a policy of removing union meeting notices from nurses' lockers while permitting other material to be posted on nurses' lockers."

2. Substitute the following for paragraphs 2(a) and (b), respectively.
(a) Rescind the unlawful portions of its Administrative Policy Manual, its Associate's Handbook, the May 7, 1997 memorandum of Cheryl Barrows, and any other written directives which prohibit solicitation during non-working time in nonpatient care areas of the hospital and/or which prohibit distribution during nonworking time in nonworking, nonpatient care areas of the hospital.
(b) Rescind the unlawful portions of the confidentiality clause in its Associate Handbook."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. May 11, 2001
John C. Truesdale, Chairman
Dennis P. Walsh, Member
(seal) National Labor Relations Board

Member Hurtgen, dissenting in part.

My colleagues conclude that the Respondent violated Section 8(a)(1) of the Act by prohibiting solicitation or distribution of literature in any halls, corridors, or other areas used or accessed by patients, families, or visitors. I disagree in substantial part.
The judge aptly summarized the current state of Board law regarding the *places* of solicitation and distribution in hospitals:1

> In summary, therefore, an employer may ban solicitation in "immediate patient care areas" but not working areas. However, in the case of distribution, the employer's rights broaden to

> permit a ban in both working areas and "immediate patient care areas." If an employer bans distribution or solicitation in a non-work, non-immediate patient care area, it bears the burden of proving that such prohibition is necessary to avoid patient disruption.

In my view, these principles are premised on an overly narrow concept of how hospitals provide treatment and care to their patients. I would revise the Board's principles to allow prohibitions of solicitation and distribution in areas where patients, their families, and visitors spend a substantial amount of time.

In *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), the Supreme Court upheld the Board's presumption that a hospital may lawfully prohibit solicitation and distribution in immediate patient care areas and in areas where it can show that such a ban is necessary to avoid disrupting care or disturbing patients. In doing so, the Court stated:

> [The] Board [bears] a heavy continuing responsibility to review its policies concerning organizational activities in various parts of hospitals. Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial settings with which the Board is more familiar. The Board should stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact in jeopardy.

Id. at 508.

In *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979), the Court specifically questioned the Board's presumption

that a ban on solicitation in corridors and sitting rooms is unlawful. The Court did not resolve the issue because it found that the presumption was rebutted in that case. However, the Court's language is instructive. The Court said:

> Because the evidence presented by the Hospital in this case is sufficient to rebut the Board's presumption as applied to corridors and sitting rooms on patients' floors, we need not here decide the rationality of this portion of the Board's presumption, nor undertake the task of framing the limits of an appropriate presumption regarding the permissibility of union solicitation in a modern hospital. Indeed, the development of such presumptions is normally the function of the Board. It must be said however, that the experience to date raises serious doubts as to whether the Board's interpretation of its present presumption adequately takes into account the medical practices and methods of treatment incident to the delivery of patient-care services in a modern hospital.

Id. at 789.
The Court also said:

> The Board, in reviewing the scope and application of its presumption, should take into account that a modern hospital houses a complex array of facilities and techniques for patient care and therapy that defy simple classification. Patients not undergoing treatment at the moment are cared for in a variety of settings—recovery rooms, intensive-care units, patients' rooms, wards, sitting rooms, and even corridors, where patients are often

encouraged to walk, or to visit with their families.

In terms of result reached, the *Baptist Hospital* Court found a ban lawful in areas where patients visit with families and friends and where the patients' families and friends confer with doctors. Id. at 784. See also *Intercommunity Hospital*, 255 NLRB 468 (1981) (solicitation ban lawful in lobby used by staff for conferring with family and friends of patients).

Consistent with the Court's pronouncements and in light of current concepts of medical care, I have reviewed current NLRB principles. As set forth below, I am persuaded that hospital patients benefit from an atmosphere of serenity and well being, and their friends and loved ones can help the healing process if they are secure in the knowledge that the hospital offers such an atmosphere.

The record evidence shows the changing nature of health care, a change that is attributable in part to the prominent role now played by health maintenance organizations and managed care facilities. As the Respondent points out, there is a heightened awareness on the part of medical professionals that: the level of trust between a patient and a medical professional is an important element in the success (or failure) of treatment; increased levels of stress and anxiety in patients are linked to deteriorations in their health; and, the overall emotional and psychological state of a patient can greatly affect the patient's ability to recover from illness.

I believe that union organizational campaigns often involve controversy, heated debate, and talk of strikes and industrial strife. Indeed, it is for this reason that hospitals can ban union activity in areas of immediate patient care. My difference with my colleagues is that I would permit a ban in other areas as well. In this regard, the Board should

take into account, and give due weight to, the fact that hospitals provide care to patients in more locations than those circumscribed by what the Board calls "immediate patient care areas." The Board should also recognize that conduct affecting families and visitors of patients can affect the state of mind, and therefore the well being, of patients. In light of its unique setting, and the extremely high stakes involved (often literally a matter of life or death), I would presumptively allow a hospital to enforce most of the prohibitions at issue here. I also note that, in the instant case, the material distributed was replete with hospital "horror stories" likely to prove extremely upsetting to any patients, families, or visitors who encounter them.

My colleagues state that the balance struck by the Board in this area of the law has stood the test of time. This is certainly true in the sense that the Board has declined to abandon or modify the presumptions at issue. However, the question is whether the times have changed so that the Board should reevaluate its policies, just as the Supreme Court has suggested it should. As explained above, I believe that the Board should do so.

I wish to stress that my position does not unreasonably restrict Section 7 communications among employees. There are myriad opportunities for such communications. For example, employee break areas, cafeterias, and vestibules offer ample opportunities for such activity. In addition, employees can, of course, converse away from the hospital, as well as in parking areas as they come to and from work. Given these alternative means of communication, I believe that, on balance, the extremely important interest of patient welfare outweighs the interest of granting additional areas for employee communication.

Consistent with my views set forth above, I would

find presumptively unlawful a prohibition of solicitation and distribution in the vestibule and in the cafeteria. As set forth above, I would presumptively permit a prohibition on solicitation and distribution "in areas where patients, their families and visitors spend a substantial amount of time." The vestibule is not such a place. It is essentially a place where people pass through from one place to another. Similarly, a hospital cafeteria is ordinarily a place that is used on a transient basis, i.e., a place to which families and other visitors can go briefly while at the hospital visiting patients. In addition, the cafeteria is generally open to the general public, just as any eating establishment would be. Accordingly, I would presumptively permit solicitation and distribution to occur there.

In view of the above, some of Respondent's policies may be presumptively unlawful. For example, the revised Administrative Policy Manual bars solicitation and distribution in "areas used by patients, families or visitors." To the extent that this covers the cafeteria and vestibule, the policy would be presumptively unlawful.2

Dated, Washington, D.C. May 11, 2001
Peter J. Hurtgen, Member
National Labor Relations Board

APPENDIX
Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government
The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.
Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.
We will not promulgate or maintain overly broad no-solicitation or no-distribution rules.
We will not promulgate or maintain overly broad confidentiality rules.
We will not refuse to permit employees to distribute literature concerning terms and conditions of employment to other employees in nonworking, nonpatient care areas of the hospital during the nonworking time of the employees involved.
We will not enforce rules regarding solicitation, distribution, and the posting of materials within the facility in a discriminatory manner.
We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.
We will rescind the unlawful portions of our Administrative Policy Manual, our Associate Handbook, the May 7, 1997 memorandum of Cheryl Barrows, and any other written directives which prohibit solicitation during nonworking time in nonpatient care areas of the hospital and/or which prohibit distribution during nonworking time in nonworking, nonpatient care areas of the hospital.
We will rescind the unlawful portions of the "confidentiality policy" in our Associate Handbook, which prohibit our employees from discussing wages, hours, or other terms and conditions of employment with each other or with their collective-bargaining representative.

Brockton Hospital

ALJ DECISION

A. Susan Lawson, Esq., for the General Counsel.
Arthur Murphy, Robert H. Morsilli, and David Powilatis, Esqs. (Murphy, Hesse, Toomey & Lehane), of Boston, Massachusetts, for the Respondent.
Jack J. Canzoneri, Esq., of Newton, Massachusetts, for the Charging Party.

DECISION
Statement of the Case

Martin J. Linsky, Administrative Law Judge.

On April 10 and December 3, 1997, a charge and first amended charge were filed in Case 1-CA-35136 and on December 12, 1997, a charge was filed in Case 1-CA-35875. The Charging Party in each case was the Massachusetts Nurses Association (Union) and the Charged Party was Brockton Hospital (Respondent).

On April 14 and May 20, 1998, the National Labor Relations Board, by the Regional Director for Region 1, issued a consolidated amended complaint and amendment, respectively, alleging that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) when since October 11, 1996, it maintained an overly broad no-solicitation/no-distribution policy and an overly broad policy regarding confidentiality, when on March 20 and 27, 1997, it prohibited employees from distributing union literature at the hospital, when on May 7, 1997, it published an overly broad no-solicitation policy, when it enforced its no-

posting rule in a discriminatory fashion, and when it gave its employee, Terry Corcoran, a performance evaluation with unfavorable comments in it and a reduced score in some rated areas.

Respondent filed an answer in which it denied it violated the Act in any way.

Trial was held before me over 8 days between November 2 and 20, 1998.

On the entire record in this case, to include posthearing briefs submitted by the General Counsel, Respondent, and the Charging Party and, on my observation of the witnesses and their demeanor, I made the following

Findings of Fact

I. Jurisdiction

At all material times Respondent, a corporation with an office and place of business in Brockton, Massachusetts, has been engaged in the operation of an acute care hospital.
Respondent admits, and I find, that Respondent meets the Board' jurisdictional standards and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act.

II. The Labor Organization Involved

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. Overview

Brockton Hospital, the Respondent, is an acute care hospital. The Massachusetts Nurses Association, the Union, is a Union, which represents close to 400 registered nurses who work at Brockton Hospital. When I refer in this decision to nurses I mean registered nurses in the unit and not supervisory nurses, licensed practical nurses, or nurse aides. Respondent has recognized the Union as the collective-bargaining representative of its nurses since approximately 1980.

There are a number of unfair labor practices alleged in this case and for the most part they concern the issue of communication between the nurses and their Union and communications between nurses. In other words a good deal of this case deals with issues of solicitation and distribution.

A collective-bargaining agreement between Respondent and the Union was in effect from October 19, 1994, to October 18, 1997.

B. Distribution of Union Literature by Nurse Employees to Other Nurse Employees

In the early part of 1997 the Union began what it called its "safe care campaign."
On March 5, 1997, the Union held a meeting at the union hall. All nurses in the unit were invited to attend. The principal subject matters to be discussed were the "safe care campaign" and the upcoming negotiations for a new contract. Approximately 100 of the close to 400 nurses in the unit attended the meeting and 40 of them volunteered to help in the "safe care campaign."

The union official most connected with the "safe care campaign" and negotiations for a new contract at Respondent's facility was Stephanie Craig Francis. A former nurse, Francis is a full-time employee of the Union.

Francis credibly testified that because of managed care, which is an approach to health care delivery which places heavy emphasis on efforts to contain costs, changes were taking place in the nursing profession and in the health care area generally which heavily impacted on nurses. Among the trends in the delivery of health care were the use of nonprofessional staff to do what traditionally had been done by nurses and the fact that managed care had the result of getting patients out of the hospital sooner and that hospital stays for patients were shorter than they had been heretofore. Francis testified, and was corroborated by Respondent's president and chief executive officer, Norman Goodman, that patients in an acute care hospital as a result of managed care had shorter stays in the hospital and were sicker. As a result nurses had to work harder.

Respondent back in 1996 wanted to reduce costs and there was an agreement reached between Respondent and the Union for nurses to voluntarily cut their hours. A number of nurses did. However, the number of patients did not reduce in number as expected and patients in the hospital were sicker and in more need of care and as a result the Union perceived that there would be staffing shortages and more mandatory overtime. The Union perceived that these issues would be brought up at upcoming bargaining sessions for a new collective-bargaining agreement at Brockton Hospital.

The Union wanted to educate the nurses in the unit about trends in the nursing field and also to prepare the nurses for the upcoming negotiations for a new contract later in the year. These trends were nationwide trends and

not peculiar to Brockton Hospital or even New England.

Beginning on Thursday, March 20, 1997, and continuing for the following nine Thursdays nurses handed out literature at the hospital. The distribution was done on Thursdays, which was payday. The distributions were to be done at the three shift changes, i.e., around 7 a.m., 3 p.m., and 11 p.m. For a period of 15 minutes or so before and for 15 minutes or so after the three shift changes the nurse volunteers would hand out literature to incoming and outgoing nurses. The nurses passing out the literature and those receiving the literature would all be off duty at the time of the distribution.

The literature was to be offered only to members of the unit and not to doctors, nurse supervisors, or other hospital staff. The literature was not to be offered to patients, family members of patients, friends of patients, vendors doing business at the hospital, or visitors. If the nurse distributing the literature knew the person as a nurse in the unit the nurse could be given the literature. If the nurse distributing the literature did not know the person they were to make sure it was a nurse in the unit before they were to distribute the literature to that person. The nurses handing out the literature and those receiving it were all employees of Respondent.

The dates of distribution were:

(1) March 20, 1997 (6) April 24, 1997
(2) March 27, 1997 (7) May 1, 1997
(3) April 3, 1997 (8) May 8, 1997
(4) April 10, 1997 (9) May 15, 1997
(5) April 17, 1997 (10) May 22, 1997

Copies of the literature distributed was received in evidence as General Counsel's Exhibit 10(a-k).

Stephanie Craig Francis credibly testified that the literature was to be distributed just to nurses in the unit by the unit employee nurses in order to educate the nurses

about trends in the nursing profession *and* to prepare the nurses for upcoming negotiations for a new contract. Nurses Tina Russell, Barbara Cooke, Carolyn Anderson, Rinette Nadeau-Bates, Terry Corcoran, and Linda Guild, all of whom distributed literature, credibly corroborate Francis as to the reasons for the distribution.

On March 20 and 27, 1997, the nurses distributing literature in the front vestibule of the main entrance to the hospital were told they could *not* distribute literature at that location. Indeed they may have been told that they could not distribute the literature on Hospital property.

On March 20, 1997, it was Nurse Manager Michelle McArthur who told nurses Terry Corcoran and Rinette Nadeau-Bates that they must "cease and desist" from handing out literature in the front vestibule.

On March 27, 1997, it was Respondent's president and chief executive officer, Norman Goodman, who told nurses Barbara Cooke and Carolyn Anderson that they could not distribute literature in the vestibule and he added "without a court order." Both Cooke and Anderson testified that Goodman said the literature couldn't be distributed without a court order and Goodman couldn't recall if he said that or not but admits that he said they could not distribute the literature.

Distribution in the vestibule was permitted by Respondent for the remainder of the 10-week campaign but Respondent persisted in its position that nurses can not distribute literature in the vestibule.

The literature consisted of compilations of articles from nursing journals, newspapers, and magazines. The articles address the issues of the adverse effect on patients caused by downsizing and restructuring of nursing staff and the use of nonprofessional employees giving the care and treatment that used to be the sole province of nurses.

The literature distributed contained selected

articles from newspapers with headlines such as "A shortcut that killed a patient," "A feeding tube in wrong hands leads to death," "A castrophe waiting to happen," "Tale of 2 hospitals, Children's undertakes reorganization similar to a plan that failed in Dallas," "Hospitals are replacing nurses with lesser-trained, lower-paid aides. Will patients pay the price?" "Who's watching? Hospitals are left on their own in setting standards for aides," "A mistake leads to baby's death," "Nurses take to the courts in fight with hospital's cost-cutting," and "Protecting Patients, curing the ills that cost cuts cause." None of the articles mentioned Brockton Hospital by name and it is agreed by all the parties to this litigation that the articles did not refer to Brockton Hospital as being the hospital where any of the mishaps in the articles happened.

Respondent called three witnesses who credibly testified that if patients or their families saw these articles they could become upset and anxious and it could undermine the trust that should exist between a patient and the medical staff treating the patient and could impact adversely on the patient. The three witnesses were Dr. David Leiman and Dr. Burton Polansky, who are on staff at Brockton Hospital, and nurse consultant and former nurse Anne Cavanaugh who does not work at Brockton Hospital but is a consultant. All three reviewed the literature that was distributed and said it could impact adversely on patients and family and Dr. Leiman went on to say it could upset even the staff at the hospital.

The articles in the literature that was distributed came from nursing journals available to the nurses and from newspapers or magazines available to the general public.

The record reflects that Respondent does not censor the TV watched in the hospital by patients and visitors nor does it censor newspapers which contain articles such as the ones

contained in the literature distributed by the nurses nor does it censor the nurses bringing into the hospital professional nursing journals which contain articles similar to the ones in the literature distributed by the nurses at Brockton Hospital. Indeed the hospital gift shop itself sells newspapers and magazines containing articles similar to those distributed and a cart is pushed through the hospital and patients and visitors can buy newspapers and magazines from the cart that sometimes carry the same types of articles distributed by the nurses.

Respondent suggested that the Union mail the literature to the nurses and Respondent would furnish free mailing labels. The Union wanted to hand deliver the literature rather than mail it to the nurses because handing it to the nurses would involve interpersonal contact and there would be a greater chance that the nurse would read the material handed him or her than read material received in the mail at home.

Although witnesses for Respondent testified that they would not want this literature to fall into the hands of patients or their families there was not a shred of evidence that any patient or family member saw any of this literature. Robert Nolet, Respondent's director of environmental sErvices, testified that one of his staff, Donna O'Connor, who did not testify, gave him some of the literature which, according to Nolet, O'Connor claimed to have picked up in the lobby. The lobby contains couches and chairs and is used by patients and family and visitors. However, there was evidence from Nolet that the lobby was frequently policed by the cleaning staff and there was no evidence any patient or family or visitors ever picked up and read or even saw the literature. The nurses did not distribute literature in the lobby but did in the vestibule, which leads into the lobby.

The hospital received no complaints about the

literature from any patient or family member of a patient or any visitor to the hospital.

Cheryl Barrows, Respondent's director of human resources, credibly testified she was given copies of the distributed literature gathered by nurse managers in the nurses' locker rooms and lounge areas which were off limits to patients, family members, and visitors. There was no evidence that any patient was ever disturbed or inconvenienced by the distribution of this literature.

The literature was handed out at three locations, i.e., at the front entrance of the hospital and inside the vestibule, outside the rear entrance of the hospital also called the BKB entrance, or Barbara Keith Building entrance, and the Emergency/Outpatient entrance. All distribution was done outside the hospital except the distribution in the front vestibule. The front vestibule is a self-contained area between the lobby and the outside entry at the front of the hospital. There are a pair of automatic doors heading into the vestibule from the outside and another pair leading into the lobby of the hospital.

Respondent argues that the vestibule is a work and/or patient care area. A security guard is posted in the lobby and can look into the vestibule. The guard on occasion will walk through the vestibule or stand in it but he will also patrol areas outside the hospital such as the parking lots. The vestibule contains two benches on which patients, family, visitors or staff are permitted to sit. Outside the vestibule are some more benches where patients, family, visitors or staff can sit. When a person is discharged from the hospital a member of the transportation department will take the patient by wheelchair through the vestibule and to the curb outside the hospital and help the patient into the car taking the patient home. Discharges are fairly common but not

constant. There are virtually no discharges at the time of the first and third shift changes, i.e., 7 a.m. and 11 p.m.

Respondent also claims that doctors sometimes chat with a patient's family member in or just outside the vestibule.

There is also a fire alarm in the vestibule, which is periodically serviced.

None of these activities could be called patient care activities. The vestibule and the other areas where the literature was distributed are not operating rooms or patient rooms. They are simply not patient care areas and not even work areas as that phase would be commonly understood as further discussed below. Interestingly enough Respondent was unaware that nurses distributed literature outside the BKB or rear entrance or outside the Emergency/Outpatient entrance. The nurses did not distribute literature by the ambulance bay to the emergency entrance.

The subject matter of the literature that was distributed clearly involved issue of terms and conditions of employment and even if some of the literature touched on political issues it was appropriate and lawful material to be distributed by the Union to the employees it represents. See, e.g., *Eastex Inc. v. NLRB,* 437 U.S. 556 (1978), where the Supreme Court agreed with the Board that a company violated Section 8(a)(1) of the Act by prohibiting distribution of a newsletter which urged employees to write their legislators to oppose incorporation of the state "right-to-work" statute into a revised state constitution, criticized a presidential veto of an increase in the federal minimum wage, and urged employees to register to vote and "defeat our enemies and elect our friends." Clearly the literature distributed at Brockton Hospital concerned terms and conditions of employment. Section 7 rights encompass "mutual aid or

protection" and reducing the number of nurses by using non professionals to do their work and the whole issue of sicker patients and its impact on nurses are matters of working conditions critical in importance to nurses.

Board precedent establishes the scope of an employer's right to promulgate rules limiting the rights of employees in soliciting and distributing materials at the workplace. The Board's rules in that regard may be summarized as having three key aspects, as follows. First, an employer is permitted to restrict employees from soliciting or distributing while working (on worktime) to the extent that the employer enforces such prohibition on an even-handed basis for all types of distribution and solicitation. Thus, absent discriminatory enforcement, an employer is within its rights under the Act to require that all solicitation and distribution occur while an employee is not on worktime. *St. John's Hospital*, 222 NLRB 1150 (1976); *Beth Israel Hospital*, 223 NLRB 1193 (1976), enfd. 554 F.2d 477 (1st Cir. 1977), affd. 437 U.S. 483 (1978) (applying and upholding the Board's rule as established in *St. John's Hospital*); *NLRB v. Baptist Hospital*, 442 U.S. 773, 778 fn. 8 (1979) (same).

Second, in the context of hospitals, an employer is presumptively allowed to ban solicitation and distribution in—what the Board and Courts refer to as—immediate patient care areas, "such as patients' rooms, operating rooms, and treatment rooms as areas of immediate patient care." *Baptist Hospital*, 442 U.S. at 780 (quoting *St. John's Hospital*, 222 NLRB at 1150). An upshot of this is that if a union in a hospital setting wishes to engage in solicitation or distribution in "immediate patient care areas" it bears the burden of proving that such access should reasonably be granted to its members or that the rule at issue is enforced discriminatorily against union activity. *St. John's Hospital*, 223 NLRB 1193.

Third, the Board has established different rules with respect to solicitation and distribution in so-called "working areas." On the one hand, an employer is presumptively permitted to ban distribution (but not solicitation) in "working areas," and a union may establish the right to distribute in a working area only if it proves that such access should reasonably be granted or that the distribution ban is enforced discriminatorily against union activity. On the other hand, an employer is presumptively prohibited from banning solicitation in working areas, and an employer who imposes such a restraint does so unlawfully unless it proves that its banning of solicitation in working areas was necessary to avoid patient disruption.

In summary, therefore, an employer may ban solicitation in "immediate patient care areas" but not working areas. However, in the case of distribution, the employer's rights broaden to permit a ban in both working areas and "immediate patient care areas." If an employer bans distribution or solicitation in a nonwork, nonimmediate patient care area, it bears the burden of proving that such prohibition is necessary to avoid patient disruption.

The front vestibule and the area outside the front entrance are not "immediate patient care areas." Again, the distribution was by members of the unit all of whom were employees of Respondent to other unit employees only. Near the BKB or rear entrance was a gazebo where patients and staff could smoke since the interior of the hospital itself was a smoke free zone. Needless to say, the area where patients and staff smoked is not an "immediate patient care area."

Board precedent has long held that merely because a work function or functions occur in a given space does not render that space a "work area" within the meaning of

the Board's rules regarding distribution. Rather, the Board has looked at the quality and quantity of work, which occurs in the area at issue, and examines whether the work is more than de minimus and whether it involves production. Thus, for example, in *United States Steel Corp.*, 223 NLRB 1246 (1976), the Board considered whether an entire facility and grounds could be considered a work area and found that it could not.1 Also, in *United States Steel Corp.* the Board considered whether an area was a "work area" within the meaning of the Act by virtue of, inter alia, the presence of guards patrolling the area, and other nonproduction workers such as janitors performing work in such area and held that these duties, performed in such area, did not render it a "work area" within the meaning of the Act, reasoning as follows:

> The Respondent raises the additional point that because nonproduction employees, such as janitors and security workers, perform some tasks in nonwork areas; these locations are converted into working areas for the purpose of banning distributions. In *National Steel Corporation*, [173 NLRB 401 (1968), enfd. 415 F.2d 1231 (C.A. 6, 1969)], under a similar statement of facts, the existence of security guards did not convert the parking lot, streets, passageways, and sidewalks into working areas as Respondent contends. In primarily nonworking areas the element of protecting the production process is not present. Whether employees are distributing literature or doing other nonwork functions like washing up, loitering, or eating, on their own time in areas designated for these purposes makes no difference to production or the tasks performed by employees in these nonwork areas. *Respondent's contention that*

> *all its property is a work area is a contention that can be asserted by every company, thus effectively destroying the right of employees to distribute literature. Some work tasks, whether it be cleaning up, maintenance, or other incidental work, are performed at some time in almost every area of every company.* [Emphasis added.]

Board precedent in the context of hospitals establish a similar stance, rejecting the notion that a space is an "immediate patient care area" or even a "work area" merely because there is the limited activity of transporting patients through a doorway, upon discharge. See *Medical Center Hospitals*, 244 NLRB 742 (1979).

The Board has not given a comprehensive definition as to what constitutes an "immediate patient care area," *Baptist Hospital*, 442 U.S. at 780, but in *St. John's Hospital*, 222 NLRB 1150 (1976), enfd. granted in part and denied in part 557 F.2d 1368 (10th Cir. 1977), the Board held that immediate patient care areas are not just anywhere in the Hospital where a patient happens to appear but rather, more narrowly, areas "such as the patients' rooms, operating rooms, and places where patients received treatment, such as x-ray and therapy areas." 222 NLRB at 1150.

Other Board precedent has found that the front entrance and lobby areas of hospitals are not immediate patient care areas or work areas. *NLRB v. Harper Grace, Inc.*, 737 F.2d 576 (6th Cir. 1984) (front entrance); *NLRB v. Southern Maryland Hospital Center*, 293 NLRB 1209 (1989), enfd. in relevant part 916 F.2d 932 (4th Cir. 1990) (front entrance); *Eastern Maine Medical Center*, 658 F.2d 1 (1st Cir. 1984) (lobby); and *Albert Einstein Medical Center*, 245 NLRB 140 (1979) (vestibule near cafeteria).

Applying the foregoing to the instant case, it may

easily be concluded that neither the front vestibule nor the area outside the admitting/outpatient entrance nor the area outside the rear or bKB entrance are work areas or immediate patient care areas and distribution of literature can not be prohibited.

C. Overly Broad No-Solicitation and No-Distribution Policy Contained in Respondent's "Associate Handbook" and "Administrative Policy Manual"

It is alleged in the complaint that Respondent maintained an overly broad no-solicitation/no-distribution policy in both its "Associate Handbook" and its "Administrative Policy Manual." The "Associate Handbook" was adopted in September 1994 and continues in effect through the trial in this case.

The nurses in the unit are called "Associates" and on page 17 of the Associates Handbook, in evidence as General Counsel's Exhibit 12, is the following language:

> Associates shall not canvass, solicit or distribute literature for any purpose during an associate's working time or the working time of the associate at whom such activity is directed.
>
> Working time is defined as those periods in which an associate is scheduled or assigned for duty. It does not include authorized lunch time.

This language is overly broad because it does not specifically exclude from the definition of working time "break times." Accordingly, maintaining such a rule was a violation of Section 8(a)(1) of the Act.

Respondent maintained since September 1995 an "Administrative Policy Manual" which contained, in

pertinent part, the following language:

> Associates
>
> Associates are prohibited from canvassing, soliciting, or distributing literature to other associate [sic]."

This part of the Administrative Policy Manual is in evidence as General Counsel's Exhibit 11. Again, the nurses in the unit are called associates and the above-quoted language is overly broad since it would purport to prohibit distribution of union literature one unit employee to another in nonwork areas and non-patient care areas and purports to prohibit soliciting on nonworking time such as during lunch or during breaks and the maintaining of such an overly broad policy is a violation of Section 8(a)(1) of the Act.

The Respondent attempted to remedy the unlawfulness of the solicitation and distribution policy contained in its Administrative Policy Manual by revising the policy, which was in force at the time the complaint issued. However, the revision dated June 30, 1997, and entitled "Solicitation of Associates" remains overly broad. Respondent's Exhibit 27. In this version, "Associates are prohibited from canvassing, soliciting, or distributing literature to other associates in any areas as defined above for any purpose during the associate's working time or the working time of the associate at whom such activity is directed." Under the Policy section, the following language appears: "Solicitation or distribution of literature may not occur at any time by associate or outside person in patient rooms, hallways, corridors and areas used by patients, families or visitors, patient lounges, any areas where patients receive treatment, or any work areas."

While it is true that a hospital may prohibit all solicitation in "immediate patient care areas," even when the employees involved are not on working time, this policy fails by prohibiting solicitation in any work areas, rather than just those, which are "immediate patient care areas." Employees who are not on working time may engage in solicitation in work areas, provided the work area is not an "immediate patient care area." Also, to the extent that the policy prohibits solicitation or distribution in "hallways, corridors, and areas used by patients, families, or visitors," it is overly broad. If the hallway, corridor, or area used by patients, families or visitors is not deemed an "immediate patient care area," then solicitation cannot be banned. If the hallway, corridor, or area used by patients, families, or visitors is not a work area, then distribution cannot be banned.

Although there is no evidence that any employee was disciplined for violating these policies in the Associate Handbook or Administrative Policy Manual it is clear that such policies in the context of the unfair labor practices in this case should be rescinded.
The Associate Handbook is furnished to each new nurse and the Administrative Policy Manual is maintained at several locations in the hospital to include nursing stations.

D. Unlawful Confidentiality Clause in Respondent's "Associate Handbook"

The Associate Handbook adopted in September 1994 and continuing in effect contained the following clause at page 17 in General Counsel's Exhibit 12:

Confidentiality

> Associate must respect the patient's right to privacy and respect the confidentiality of information regarding patients, associates, or hospital operations. Information concerning patients, associates, or hospital operations should not be discussed either inside or outside the hospital, except strictly in connection with hospital business.

This confidentiality clause is overly broad since it would prohibit nurses from discussing hours, wages, and other terms and conditions of employment with each other or their union representatives unless they are doing so "strictly in connection with hospital business." On its face it is at least ambiguous. Is a discussion between nurses or with their union representative on whether or not to pursue a grievance over a policy at work a discussion "strictly in connection with hospital business" or not? The confidentiality clause is ambiguous.

Although there was no evidence that any employee was ever disciplined for violating this rule it would have a tendency to cause nurses who read it to believe it restricted his or her right to discuss hours, wages, and other terms and conditions of employment.

Obviously Respondent can promulgate a rule which respects the right of privacy of its patients but should not promulgate a rule which inhibits employees in the exercise of their rights under Section 7 of the Act which rights include the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The confidentiality clause could be amended by adding to it the following language "Nothing in this

confidentiality clause should be interpreted to interfere with the rights of associates under Section 7 of the National Labor Relations Act" or by adding language that the confidentiality clause "does not restrict employees in their right to discuss hours, wages, and other terms and conditions of employment."

The maintaining of the confidentiality clause in its present form is a violation of Section 8(a)(1) of the Act. See *Pontiac Osteopathic Hospital*, 284 NLRB 442, 465–466 (1987), and *Indian Hills Care Center*, 321 NLRB 144, 155 (1996), where language similar to that in the instant case was found unlawfully overbroad because it could be construed to prohibit employees from discussing hours, wages, and other terms and conditions of employment.

E. May 7, 1997 Memo Regarding Solicitation

As noted above the distribution of literature by nurses to fellow nurses in the unit began on March 20, 1997, and continued for 10 weeks.

On May 7, 1997, nurse Tina Russell, a member of the unit who was active in the Union, received a memo from Respondent's director of human resources Cheryl Barrows.

Barrows' memo provided, in pertinent part, as follows:

> We have asked you not to distribute literature where patients access the building, and our position is that such distribution is prohibited and inappropriate. However, we have not taken steps to stop your handbilling. This does not change our position. Since the activity has continued, we want to reiterate our position. We do not allow solicitation of any nature in areas accessed by patients, their families, or visitors. The lobby

> functions as a patient waiting area. We restrict any activity that is disruptive to patients, family members, and visitors. Any activity that undermines the confidence of the patients that come to Brockton Hospital is not in the best interest of our patients or the community. Our concern is for our patients. They should be able to seek and obtain care in a friendly environment where the sole concern is for their well being.

The prohibition of solicitation of any nature "in areas accessed by patients, their families, or visitors" is overbroad.

Respondent may lawfully prohibit solicitation in immediate patient care areas or in work areas where it can be demonstrated that the solicitation will be disruptive to patient care or disturbing to patients. The blanket prohibition of solicitation in areas merely accessed by patients and their families, or visitors, including the lobby, is overly broad and violative of Section 8(a)(1) of the Act. See *Beth Israel Hospital v. NLRB*, supra.

F. Incident Involving Posting of Union Literature in August 1997

The collective-bargaining agreement in effect from October 19, 1994, to October 18, 1997, contained the following language in article VI:

> The Hospital will provide space on a bulletin board for posting notices of Association meetings for nurses covered by the Agreement. Copies of such notices shall be submitted to Vice President of Human Resources or his designee prior to their being posted.

In or about August 1997 nurse Wendy Baron posted a handwritten notice of a union meeting on her locker. Her locker is in one of the nurses' locker rooms and entry into the locker room is limited to staff only. The union meeting was to be held at another nurse's home and was a meeting just for the 16 nurses in that medical unit and not a union meeting for the close to 400 nurses who work at the hospital.

It is uncontested that Administrative Coordinator Carla McRae, an admitted supervisor and agent of Respondent, removed the notice of the union meeting and left the following note for Baron in her mail slot in the locker room:

> Hi Wendy, Union business postings are not to be posted randomly on lockers. You can with my or Susan's permission post notices on the bulletin board.

Susan is another nurse supervisor.

As a result of McRae removing the notice and Baron not knowing she had done so because Baron was off work for several days after posting the notice of the union meeting and as a result knowledge of the meeting did not get circulated among the nurses and only 4 of 16 nurses attended the meeting and two of them were Baron and the nurse at whose house the meeting was to be held.

When Baron spoke with McRae after reading McRae's note to her McRae told Baron that with respect to the Union notice that it was just "slapped together" and that union notices should be put together more "professionally."

It is conceded by all parties to the litigation that the practice at the hospital was that union meeting notices could be posted in the locker room but the person posting

it needed permission from management. This is consistent with the collective-bargaining agreement. However, the credible and uncontradicted testimony of numerous nurse witnesses was that all sorts of material was posted on lockers without prior permission and were not removed by management, e.g., girl scout cookie sales, school fund raising notices, pictures, all types of announcements, letters from patients, etc.

It would be unlawful for Respondent to permit all manner of postings on lockers without management permission and require management permission only with regard to union postings. That is the case here and hence I find a violation of Section 8(a)(1) of the Act. See *Lassen Community Hospital*, 278 NLRB 370 (1986).

The offense was compounded by management in the person of McRae telling a union activist that her note was unprofessional. It is none of management's business how professional or unprofessional the notice looks and whether it is typed or handwritten. If the union meeting notice contained obscene language that would be a different story but it did not.

The allegations in the complaint regarding the removal of the notice and the demeaning comments of McRae to Baron were not contained in any charge alleging the conduct as unlawful. These allegations should be dismissed unless I find that they are closely related to the charges that were timely filed. It is my conclusion that, under the rationale of *Redd-I, Inc.*, 290 NLRB 1115 (1988), they are closely related and the allegations will not be dismissed as untimely within the meaning of Section 10(b) of the Act. They are closely related because the entire case involves the issues of communications between the Union and the unit members and among unit members and all of the allegations allegedly occurred in 1997 in the months preceding negotiations for a new collective-bargaining

agreement. I do not find that the Union clearly and unmistakably waived any right with respect to this matter by agreeing to the contract language spelled out above because the notice posted by Baron was not a full association meeting but just for a small group and the thrust of the contract language was the duty of Respondent to provide a place for the Union to post union meeting notices.

G. Unfavorable Comments and Ratings in Performance Evaluation of Terry Corcoran

In June 1997, Terry Corcoran, a nurse in the bargaining unit who had handed out literature beginning in March 1997, received her annual performance appraisal from her nurse manager Mary Christian.

Corcoran had worked at Brockton Hospital for 10 years and had over the years received an overall rating of "2," i.e., meet expectations, and had received a two in all rated categories.

In June 1997, Corcoran again received an overall rating of two, i.e., meets expectations, but received a three, i.e., needs improvement, in the categories of "may perform work of a higher level in preparation for increased responsibilities" and "may be assigned additional responsibility in absence of Nurse Manager." Nurse Manager Mary Christian wrote in the following language "has difficulty performing charge duties."

In addition in the comment section of the performance evaluation form Christian wrote, "Terry is a 24°/wk RN on A4. She is motivated and knowledgeable concerning her role. Her transition from B3 (Resp.) to A4 (a larger unit w ortho/resp. focus) has moved along well. Terry is committed to her profession yet does not always display behavior supportive of the department. Investing

time to work within the system, exploring issues from all sides could be of benefit."

On March 20, 1997, Corcoran was involved in an incident with management when she was handing out literature in the vestibule of the hospital. Administrative coordinator Michelle McArthur told Corcoran to "cease and desist" from handing out the literature. McArthur's impression of the encounter in the vestibule is more benign than Corcoran's impression. Nurse Renette Nadeau-Bates supports Corcoran's version of a somewhat angry confrontation between Corcoran, who was insisting on the right to distribute the literature, and McArthur's insistence that she not do so and indeed, "cease and desist" from doing so. I found all women credible but note that based at least on my observation of Corcoran's demeanor when she testified before me that she can became a little emotional. It is the contention of the General Counsel that Corcoran's encounter with management when Corcoran was engaged in the protected concerted activity of lawful distribution of literature prompted the lower evaluation but I don't agree.

A number of other witnesses who were active for the Union and had encounters with management over the distribution of literature did *not* receive lower evaluations from Christian, e.g., Tina Russell and Barbara Cooke.

In addition, Mary Christian, who evaluated Corcoran, credibly denied that Corcoran's union activities had anything to do with the evaluation.

Christian gave Corcoran two "threes" (needs improvement) because of Corcoran's difficulty in performing charge nurse duties.

It is uncontested that Corcoran told Christian that she (Corcoran) did not like being a charge nurse, i.e., a line nurse who is in charge of the floor during a shift. Christian credibly testified that registered nurses who worked 40,

32, or 24 hours a week, Corcoran was a 24-hour-a-week nurse, were all called upon periodically to be the charge nurse. It is also undisputed that one day when Corcoran had charge duty it was quite busy and Corcoran had a breakdown on the floor. Corcoran broke down in tears and had to see Christian. Corcoran cried again in front of Christian and Christian counseled Corcoran and told her that they should look at the problem and fix it. Based on Corcoran's breakdown and all evidence points to the breakdown occurring in the rated period, it was not unreasonable to write that she had "difficulty performing charge duties" as Christian wrote.

The other comments on the evaluation were prompted by Christian's belief that Corcoran did not participate on enough hospital committees and Corcoran agreed she did not participate on committees because she was going to college. There was also an incident after Corcoran's encounter with McArthur in the hospital vestibule when Corcoran said, "here comes the Gespato" referring to nurse supervisors Kim Walsh and Michelle McArthur. Corcoran didn't even remember saying the words but Walsh and McArthur testified she said it and active union member Barbara Cooke confirmed that Corcoran said it. Even Corcoran believes she said it after Cooke corroborated it for her sometime before the trial in this case.

Based on the testimony of Cooke I believe that Corcoran said, "here comes the Gestapo" but didn't intend for Walsh and McArthur to hear it. However, I credit Walsh and McArthur when they testified that they heard it and thought it was intended for them to hear it. Suffice it to say Walsh told Christian about the incident prompting Christian to consider it in her comments on the evaluation.

Christian also credibly testified that Corcoran complained about the merger of two units at the hospital

(B3 and A4) without, in Christian's opinion, offering any concrete proposals. This was also taken into account when Christian prepared the evaluation. Suffice it to say I credit Christian's testimony that Corcoran's union activity was not a factor in the evaluation she gave Corcoran.

In 1998 Corcoran received all "2s" (meets expectations). In addition, this lower evaluation in 1997 did not result in Corcoran losing any money or hours and in any way jeopardized her job security or nursing career with Brockton Hospital.

I find that the Act was not violated when Corcoran received the evaluation she received.

Remedy

The remedy in this case should include a cease-and-desist order, the posting of an appropriate notice, and the revocation of certain overly broad written policies of Respondent.

Conclusions of Law

1. The Respondent, Brockton Hospital, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Massachusetts Nurses Association, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act:

> (a) When it promulgated and maintained overly broad no-solicitation/no-distribution rules in its "Administrative Policy Manual" and "Associate Handbook."

(b) When it promulgated and maintained an overly broad confidentiality rule in its "Associate Handbook."

(c) When it refused to permit employees to distribute literature concerning terms and conditions of employment to other employees in nonworking, nonpatient care areas of the hospital during the nonworking time of the employees involved.

(d) When it discriminatorily enforced a policy of removing union notices from a nurse's locker while permitting other material to be posted on nurses' lockers and when it told an employee that a union meeting notice was "unprofessional."

4. The unfair labor practices committed by Respondent effect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended2

ORDER

The Respondent, Brockton Hospital, Brockton, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining overly broad no-solicitation/no-distribution rules in its "Administrative Policy Manual" and "Associate Handbook."

(b) Promulgating and maintaining an overly broad confidentiality rule in its "Associate Handbook."

(c) Refusing to permit employees to distribute literature concerning terms and conditions of employment to other employees in nonworking, nonpatient care areas of the hospital during the nonworking time of the employees involved.

(d) Discriminatorily enforcing a policy of removing union meeting notices from nurses' lockers while permitting other material to be posted on nurses' lockers and telling employees that a union meeting notice was unprofessional.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawful portions of the "Administrative Policy Manual," "Associate Handbook," May 7, 1997 memorandum of Cheryl Barrows and any other written directives which prohibit solicitation or distribution during nonworking time in nonworking, nonpatient care areas of the hospital.

(b) Modify the confidentiality clause in the "Associate Handbook" to make it clear that unit employees may discuss hours, wages, and other terms and conditions of employment with their fellow employees and representatives of their union.

(c) Within 14 days after service by the Region, post at its Brockton Hospital facility in Brockton, Massachusetts, copies of the attached notice marked "Appendix."3 Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 20, 1997.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 25, 1999

APPENDIX
Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government
The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.
Section 7 of the Act gives employees these rights:

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.
Section 7 of the Act gives employees these rights.
To engage in self organization;
To form, join, or assist any unions;
To bargain collectively through representatives of their own choosing;
To act together for other mutual aid or protection;
To choose not to engage in any of these protected concerted activities.
We will not do anything that interferes with, restrain, or coerces our employees in their exercise of these rights.
More specifically,
We will not promulgate or maintain overly broad no-solicitation/no-distribution rules.
We will not promulgate or maintain an overly broad confidentiality rule.
We will not refuse to permit employees to distribute literature concerning terms and conditions of employment to other employees in nonworking, nonpatient care areas of the hospital during the nonworking time of the employees involved.
We will not enforce rules regarding solicitation, distribution, and the posting of materials within the facility in a discriminatory manner.
We will not tell employees that their union meeting notices are "unprofessional."
We will not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Section 7 of the Act.

We will rescind the unlawful portions of the "Administrative Policy Manual," the "Associate Handbook," the May 7, 1997, memorandum of Cheryl Barrows and any other written directives on which prohibit solicitation or distribution during nonworking time in nonworking, nonpatient care areas of the hospital.

Brockton Hospital

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by maintaining an overly broad confidentiality policy, which is cited at sec. III,D, par. 1, of his decision, we do not pass on the judge's suggested revisions to that policy.
In adopting the judge's recommended dismissal of the complaint allegation that the Respondent violated Sec. 8(a)(3) and (1) by its 1997 performance appraisal of employee Terry Corcoran, in sec. III,G of his decision, we rely additionally on the undisputed testimony by Nurse Manager Mary Christian that Corcoran's overall evaluation of "meets expectations" was not affected by the

fact that she was rated "needs improvement" in the two areas of "may perform work of a higher level in preparation for increased responsibilities" and "may be assigned additional responsibility in absence of Nurse Manager," out of 41 separate evaluation elements.

[4] We have modified the judge's recommended Order to more closely reflect the violations found and have issued a new notice to employees.

[5] The judge also found, and we agree, that the Respondent violated Sec. 8(a)(1) by prohibiting the distribution of union literature outside of the BKB and Outpatient/Emergency entrance.

[6] Further supporting the judge's implicit credibility determinations, the Respondent's May 7, 1997 memorandum to the Union concerning the literature distributions states that "[w]e have asked you not to distribute literature where patients access the building." (Emphasis added.)

[7] 268 NLRB 394 (1983).

[8] *Id.* at 395.

[9] 308 NLRB 167 (1992), enfd. 12 F.3d 213 (6th Cir. 1993) (per curiam).

[10] Id. at 168.

[11] The judge stated, at sec. III,C, par. 7, of his decision, that the policy, as set forth in the Administrative Policy Manual, is overly broad because "If the hallway, corridor or area used by patients, families or visitors is not deemed

an 'immediate patient care area,' then solicitation cannot be banned. If the hallway, corridor or area used by patients, families or visitors is not a work area, then distribution cannot be banned."

[12] Our colleague cites to testimony in this case tending to show that the nature of health care is changing, and that patients' health and medical treatment may be adversely affected by increased levels of stress and by a lack of trust between patients and medical professionals. The dissent asserts, in essence, that patients, their families, and visitors, must be broadly shielded from "union organizational campaigns," which often involve "controversy, heated debate, and talk of strikes and industrial strife," all of which could affect patients' stress levels and diminish their trust in their caregivers.

[13] See *St. John's Hospital*, 222 NLRB 1150–1151 (1976), enfd. in part 557 F.2d 1368 (10th Cir. 1977); *Eastern Maine Medical Center*, 253 NLRB 224,225–226 (1980), enfd. 658 F.2d 1 (1st Cir. 1981).

[14] *Id.*

[15] *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978).

[16] See *NLRB v. Baptist Hospital*, 442 U.S. 773, 786–787 (1979) (affirming Board's order insofar as it found that ban on solicitation and literature distribution in "any area of the hospital which is accessible to or utilized by the public" was unlawful with respect to the hospital's first floor cafeteria, gift shop and lobbies); *Beth Israel Hospital v. NLRB*, supra (rule banning solicitation or distribution of literature in all public areas violated Sec. 8(a)(1)); *Eastern Maine Medical Center*, supra (rule banning solicitation

except during breaktime in nonwork areas was facially invalid and violated Sec. 8(a)(1)); and St. John's Hospital, supra (rule banning solicitation in all areas to which patients and visitors have access was facially invalid and violated Sec. 8(a)(1)).
Intercommunity Hospital, 255 NLRB 468, 470–474 (1981), cited by the dissent, is fully consistent with the principles articulated above. In that case, the employer maintained a no-solicitation policy, which provided that

> Employees may not solicit or distribute literature, for any purpose, during working time. Employees may not solicit or distribute literature, at any time, for any purpose, in immediate patient care areas.

The Board found that the policy was facially lawful, and that, in the particular circumstances of that case, the employer had lawfully applied the policy to its halls and corridors and to its lobby and waiting room. The Board was not faced with a sweeping ban on solicitation and literature distribution of the character present in this case. Likewise, the Board is not presented, in this case, with the question of whether the Respondent could lawfully have applied a facially lawful policy to prohibit solicitation or distribution of literature in its hallways and corridors. Cf. *Intercommunity Hospital*, supra at 472 (halls and corridors adjacent to patient rooms, operating rooms, x-ray rooms, and other immediate patient care areas are extensions of immediate patient care areas in which solicitation presumptively may be prohibited).

[17] In *NLRB v. Baptist Hospital*, the Supreme Court declined to enforce the Board's order insofar as it prohibited the Respondent from maintaining rules restricting solicitation and literature distribution in its

corridors and sitting rooms on patients' floors. The Board's Order in this case does not contain any of the provisions found objectionable by the Supreme Court in *NLRB v. Baptist Hospital*. Accordingly, the Supreme Court's criticism of that aspect of the Board's approach to solicitation and distribution of literature in hospitals, cited by the dissent, has no bearing on the issues presented in this case.

[18] *Beth Israel Hospital v. NLRB*, supra, 437 U.S. at 491. See also *St. John's Hospital*, supra, 222 NLRB at 1151 ("[o]n balance, the interests of patients well enough to frequent such areas do not outweigh those of the employees to discuss or solicit union representation").

[19] *Beth Israel Hospital v. NLRB*, supra at 501 (quoting *NLRB v. Truck Drivers*, 353 U.S. 87, 96 (1957)).

[20] We do not, however, adopt the judge's statement that all of the parties conceded that the practice at the hospital was that union meeting notices could be posted in the locker room but that the person posting it needed permission from management. The Respondent's Administrative Policy Manual provides that employees must obtain approval from the Respondent's management before posting information on department bulletin boards or common area bulletin boards. However, and consistent with the position of the General Counsel and the Union, the testimony credited by the judge clearly establishes that, in practice, "all sorts of material was posted on lockers without prior permission and were not removed by management."
As discussed in the judge's decision, art. VI of the 1994–1997 collective-bargaining agreement between the Respondent and the Union provided that the Respondent

"will provide space on a bulletin board for posting notices of Association meetings for nurses covered by the Agreement. Copies of such notices shall be submitted to Vice President of Human Resources or his designee prior to their being posted." Pursuant to this clause, the Respondent provided the Union with access to a bulletin board in its cafeteria. The judge found, and we agree, that neither the plain language of this clause nor the record evidence concerning the parties' practice under the clause supports the Respondent's contention that the clause has any applicability to the posting of union meeting notices, by individual employees, on an employee's locker in employee locker rooms.

[21] Baron testified that she understood McRae's comment as a reference to the fact that the notice was handwritten.

[22] In light of our finding that this complaint allegation should be dismissed on the merits, we do not pass on the judge's finding that the allegation, which was not contained in any timely charge, was not untimely under Sec. 10(b) of the Act because it was closely related to a timely charge under the principles set forth in *Redd-I, Inc.*, 290 NLRB 1115 (1988).

1 This case does not involve the separate issue as to the *times* for solicitation and distribution.

2 My colleagues suggest that I concede that the Respondent's policies would be presumptively unlawful under my approach. However, as explained above, I do so only to the extent that those policies would bar solicitation and distribution in the cafeteria and vestibule.

1 The Board held:

> Respondent contends first that all property at the South Works and Gary Works constitutes a work area from which distribution of literature may be properly prohibited. The General Counsel counters that this contention is wrong based on the fact that the property consists of thousands of acres, which include large parking areas, roadways, walkways, and open spaces between the various structures on the land. The buildings themselves contain lockerrooms, restrooms, lunchrooms, and vending machine areas. Such places have been found by the Board to be nonwork areas. See *Plant-City Steel Corporation*, [138 NLRB 839 (1962), enfd. 331 F.2d 1231 (6th Cir. 1964)] (parking lots, street passageways, and sidewalks on plant premises very similar to Respondent's found to be nonworking areas); and *Rockingham Sleep Wear, Inc.*, [188 NLRB 698] (1971)] (production area used as a lunchroom found to be a nonwork area during lunch break).

United States Steel Corp., supra at 1247.

2 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

3 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX B

BROCKTON HOSPITAL v NLRB
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Argued March 11, 2002 Decided June 28, 2002

No. 01-1219
Brockton Hospital,
Petitioner
v.
National Labor Relations Board,
Respondent
Massachusetts Nurses Association,
Intervenor
On Petition for Review and Cross-Application
for Enforcement of an Order of the
National Labor Relations Board

Arthur P. Murphy argued the cause for petitioner. With him on the briefs were Gregory J. Walsh and Robert H. Morsilli.

James M. Oleske, Jr., Attorney, National Labor Relations Board, argued the cause for respondent. With him on the brief were Arthur F. Rosenfeld, General Counsel, John H. Ferguson, Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, and David S. Habenstreit, Supervisory Attorney. Anne M. Lofaso, Attorney, entered an appearance.

Jack J. Canzoneri was on the brief for intervenor.

Before: Ginsburg, Chief Judge, and Rogers and Garland, Circuit Judges.

Opinion for the Court filed by Chief Judge Ginsburg.

Ginsburg, Chief Judge: Brockton Hospital petitions for review of a Decision and Order of the National Labor Relations Board holding that the Hospital violated § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), by preventing the Massachusetts Nurses Association (the Union) from distributing literature to its members at entrances to the Hospital, maintaining overbroad solicitation, distribution and confidentiality policies, and removing from the door of a nurse's locker a notice announcing a union meeting. The Board has cross-applied for enforcement of its order and the Union has intervened in support of the Board. We deny the petition and grant the cross-application for enforcement except with respect to the alleged but uncharged unfair labor practice stemming from the removal of the meeting notice.

I. Background

The Union has represented the registered nurses at Brockton Hospital, an acute care facility, for over 20 years. In anticipation of the October, 1997 expiration of the Union's collective bargaining agreement with the Hospital, the Union began early in that year what it called a "safe care campaign," part of which involved the distribution of literature to nurses in the bargaining unit. The literature, as described by the Board, consisted largely of articles addressing "the adverse effect on patients caused by downsizing and restructuring of nursing staff and the use of nonprofessional employees giving the care and treatment that used to be the sole province of nurses." *Brockton Hosp. and Mass. Nurses Ass'n*, 333 N.L.R.B. No. 165 at 7 (2001). The Hospital reasonably characterizes the literature as containing "shocking and sensational

headlines" and focusing upon "horror stories of patient death and injury due to allegedly unsafe care" at hospitals other than Brockton.

For ten consecutive Thursdays beginning March 20, 1997 off-duty nurses distributed this literature to other nurses in the vestibule at the front entrance to the Hospital, at the rear entrance, and at the Emergency/Outpatient entrance. The Hospital stopped distribution in the vestibule on the first two occasions but thereafter allowed it while making clear its view that it could lawfully prohibit the practice. In August, 1997 a Hospital supervisor removed from a nurse's locker a notice of a union meeting, which notice had been posted without prior permission.

The Union timely filed unfair labor practice charges concerning the Hospital's interference with the distribution of literature, as well as its policies limiting solicitation and distribution and delineating the nurses' obligations with regard to confidentiality. The General Counsel thereafter is- sued a complaint alleging that the Hospital's (1) ban on distribution in the vestibule; (2) solicitation and distribution policies; (3) confidentiality policy; and (4) removal of the union notice each violated § 8(a)(1) of the Act. The ALJ so held, *Brockton Hosp.*, 333 N.L.R.B. No. 165 at 10-12, and the Board agreed, adopting as its own much of the ALJ's reason ing, *id.* at 1-3.

II. Analysis

The court reviews the Board's decision deferentially. We uphold its findings of fact if they are supported by substantial evidence, *see United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998), and abide its interpretation of the Act if it is reasonable and consistent with controlling precedent, *see Local 702, Int'l Bhd. of Elec.*

Workers v. NLRB, 215 F.3d 11, 15 (D.C. Cir. 2000).
The Hospital challenges all the Board's determinations that it violated § 8(a)(1). That provision makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of" their § 7 rights, among others, to "assist labor organizations ... and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157. Section 7 "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978).

A. The prohibition of distribution

A hospital is presumptively allowed to prohibit the distribution of literature in any work area and to ban solicitation more narrowly in "immediate patient-care areas." *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 778-79 (1979). Outside work areas a hospital may ban solicitation and distribution only as "necessary to avoid disruption of health-care operations or disturbance of patients." *Id.* at 779. In this case the Board determined that the Hospital unlawfully prohibited employees from distributing union literature in the vestibule and at the other entrances because those areas are not work or immediate patient care areas and the Hospital had not demonstrated that the prohibition was necessary to avoid disruption or disturbance. *See Brockton Hosp.*, 333 N.L.R.B. No. 165 at 7-10. The Hospital attacks these conclusions on several grounds, none of which we find persuasive.

The Hospital's primary contention is that prohibiting distribution in the vestibule was necessary to avoid disturbing patients. The Hospital first argues that the ALJ, whose opinion the Board adopted on this point,

failed altogether to address this issue. Not quite. The ALJ's decision could have been more precise, but we agree with the Board that it is clear enough the ALJ was of the opinion the Hospital had not shown a likelihood of patients being disturbed: The ALJ acknowledged that the Hospital's expert witnesses had "credibly testified that if patients or their families saw these articles they could become upset and anxious," but went on to find "there was not a shred of evidence that any patient or family member saw any of this literature," the Hospital "received no complaints about the literature," and "[t]here was no evidence that any patient was ever disturbed or inconvenienced by the distribution of this literature." *Id.* at 7-8.

Turning to the merits, the Hospital argues that it presented evidence the prohibition was necessary, to wit, the disturbing nature of the literature; the testimony of three doctors that if patients saw the literature they could experience stress and become distrustful; the number of patients that use the vestibule to enter and exit the Hospital; and the testimony that literature (which may have been distributed in the vestibule) was left in various parts of the Hospital. The Hospital's position is that it was not required to show actual disruption or disturbance, but only that the distribution "may adversely affect patients," quoting *Baptist Hosp.*, 442 U.S. at 782. Finally, the Hospital asserts the Board failed to consider "the availability of alternative means of communication," as required by *Baylor Univ. Med. Ctr. v. NLRB*, 662 F.2d 56, 63 (D.C. Cir. 1981). The Board and the Union argue that the Board reasonably concluded the Hospital failed to show a likelihood of disturbance.

The Board and the Union concede, and we agree, that the Hospital had to show only a likelihood of, not actual, disruption or disturbance, *see Baptist Hosp.*, 442 U.S.

at 781 n.11; but substantial evidence supports the Board's decision that the Hospital did not meet even this standard. The Hospital's experts testified that if patients saw or heard about the content of the literature they would be upset, *Brockton Hosp.*, 333 N.L.R.B. No. 165 at 7-8; the Hospital presented no reason, however, to believe patients were likely to learn of the content of the literature. As the Board points out, when the Hospital stopped the nurses from distributing the literature in the vestibule, the nurses made clear that they intended to distribute it only to members of the Union - a practice approved by the Supreme Court in *Beth Israel*, 437 U.S. at 503 n.23 - and so they did. As the Board further notes, the Hospital produced no evidence that any patient or patient's family ever saw the literature, and there is no evidence of any complaint by a patient or a patient's relative. In *Beth Israel* the Court found the same lack of evidence regarding patients being disturbed "[e]specially telling." *Id.* at 502. Furthermore, the Board reasonably discounted the significance of the Hospital's evidence that some literature was found in the lobby and near the cafeteria because "the lobby was frequently policed by the cleaning staff and there was no evidence any patient or family or visitors ever picked up and read or even saw the literature." *Brockton Hosp.*, 333 N.L.R.B. No. 165 at 8.

We also agree with the Board that the Hospital's reliance upon *Baptist Hosp.*, 442 U.S. at 782-86 (upholding solicitation ban in corridors and sitting rooms) and *Baylor*, 662 F.2d at 65 (indicating that prohibition of solicitation in cafeteria during specified times may be lawful), is misplaced. In both cases, as the Board points out, the hospital presented evidence that the prohibited activity was likely to disturb patients or to disrupt operations. *Baptist Hosp.*, 442 U.S. at 784; *Baylor*, 662 F.2d at 60 n.5, 62. Finally, although the availability of alternative means of

communicating with employees is an important consideration in some cases, *see Beth Israel*, 437 U.S. at 505; *Baylor*, 662 F.2d at 63-64, we agree with the Board that "the possible availability of alternative areas for distribution of union literature is of marginal importance when," as in this case, "the employer has not demonstrated an impact on patient care." *See NLRB v. Southern Md. Hosp. Ctr.*, 916 F.2d 932, 936 (4th Cir. 1990).

The Hospital also challenges the Board's conclusion that the vestibule is not a work area. The Hospital points out that employees assist discharged patients through the vestibule, janitors clean the area, and a guard is sometimes stationed there. Here the Hospital relies upon Pikeville United *Methodist Hosp. of Ky. v. NLRB*, 109 F.3d 1146 (6th Cir. 1997), where the court referred to a patient drop-off area as a work area. In the alternative the Hospital argues that the vestibule should be considered part of the lobby, which it contends is also a work area.

The Board in its order correctly relied upon two of its prior cases for the proposition that cleaning, guarding, and escorting patients do not a work area make. *Brockton Hosp.*, 333 N.L.R.B. No. 165 at 9 (citing *United States Steel Corp.*, 223 N.L.R.B. 1246 (1976), and *Medical Ctr. Hosp.*, 244 N.L.R.B. 742 (1979)). As for the reference in *Pikeville* to the contrary, it is unsupported by any analysis - not surprising, for the matter seems not to have been disputed, 109 F.3d at 1158 - and the same circuit has since held that an area in which minimal work occurs is not a work area, *see United Parcel Service, Inc. v. NLRB*, 228 F.3d 772, 775-77 (6th Cir. 2000) (check-in area where instructions were sometimes given to drivers was not a work area); *accord Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 472-73 (5th Cir. 2001) (upholding ALJ's determination that entranceway with desk at which foreman occasionally sat was not work area). Finally, the Board's decision to treat the vestibule -

"a self-contained area between the lobby and the outside entry," *Brockton Hosp.*, 333 N.L.R.B. No. 165 at 8 - as a room distinct from the lobby was reasonable. The areas were, after all, separated by glass doors.

The Hospital next contends there is not substantial evidence that it prohibited the Union from distributing literature at the rear and Emergency/Outpatient entrances. The Hospital concedes that it failed to raise this issue before the Board, *see* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board ... shall be considered by the court"), but asks the court to consider the argument because the ALJ did not make clear that he found the Hospital had prohibited distribution at those entrances and therefore the Hospital did not argue to the Board that it had not prevented distribution there. Although the ALJ's decision is indeed ambiguous, the Board's decision is not, *see Brockton Hosp.*, 333 N.L.R.B. No. 165 at 1 n.5; yet the Hospital did not seek reconsideration by the Board. Consequently, the Hospital's argument is not properly before the court. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982).

Next, the Hospital argues that the literature distributed by the nurses disparaged the Hospital's services and its distribution was therefore unprotected pursuant to *NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464 (1953) *(Jefferson Standard)*. For two reasons, we cannot agree. First, as the Board pointed out in its order, "it is agreed by all the parties to this litigation that the articles did not refer to Brockton Hospital as being the hospital where any of the mishaps in the articles happened." *Brockton Hosp.*, 333 N.L.R.B. No. 165 at 7. In other words, Brockton's services were not expressly disparaged. Second, insofar as the implication was that the same problems could occur at Brockton if it downsized its nursing staff, that inference could be drawn only by the

Hospital's nurses, not by the public, because the distribution was limited to the nurses. In these circumstances the concern underlying *Jefferson Standard*, that activity "reasonably calculated to harm the company's reputation and reduce its income" rather than further collective bargaining be excluded from the protection of the Act, 346 U.S. at 471, simply is not present.

Finally, the Hospital contends that the Board has ignored its "heavy continuing responsibility to review its policies concerning organizational activities in various parts of hospitals," *Beth Israel*, 437 U.S. at 508. According to the Hospital, that review should have led the Board to decide that a hospital may presumptively ban solicitation and distribution in any area "to which patients, their families and visitors have regular access." The Board clearly did appreciate its continuing duty to keep current its approach to distribution and solicitation in hospitals; it simply found "no support in the record for departing from ... well-settled principles." *Brockton Hosp.*, 333 N.L.R.B. No. 165 at 2. Indeed, the Hospital does not even purport to have provided evidence that solicitation and distribution in all areas to which patients, their families, and visitors have access is disruptive or disturbing. Hence, the Board was not obligated to change its presumptions, and the Hospital's only defense of its policies limiting solicitation and distribution must fail.

B. Confidentiality Policy

The Board held that the Hospital's confidentiality policy was overbroad and therefore unlawful. That policy states:

> "Information concerning patients, associates [that is, nurses], or hospital operations should not be

> discussed either inside or outside the hospital, except strictly in connection with hospital business." *Brockton Hosp.*, 333 N.L.R.B. No. 165 at 10. The Board held the policy overbroad because "it would have a tendency to cause nurses who read it to believe it restricted his or her [sic] right to discuss hours, wages, and other terms and conditions of employment." *Id.*

According to the Hospital, the policy "merely protects the confidentiality of patient information," making the Board's decision contrary to this court's teaching in *Aroostook County Reg'l Ophthalmology Ctr. v. NLRB*, 81 F.3d 209, 213 (1996), and the Board's prior decision in *Lafayette Park Hotel*, 326 N.L.R.B. 824 (1998). Not at all. The policy on its face prohibits nurses from discussing with each other, let alone Union officials, "information concerning [themselves]," which the Board argues the nurses could reasonably read to include their wages, hours, and working conditions - the very stuff of collective bargaining. The employer in *Aroostook*, by contrast, prohibited discussion only of "office business," which the court expressly understood not to cover the wages, hours, and working conditions of employees. 81 F.3d at 212-13. Considering the terms of the confidentiality policy in this case, the Board reasonably applied the standard set forth in *Lafayette Park*, namely, whether a rule "would reasonably tend to chill employees in the exercise of their Section 7 rights," 326 N.L.R.B. at 825.

C. Removal of the union meeting notice

The Hospital argues that the General Counsel lacked authority to include in the complaint the allegation that removing the notice of a union meeting violated §

8(a)(1) because the removal was neither the subject of nor closely related to any unfair labor practice charge filed by the Union. Section 10(b) of the Act, 29 U.S.C. § 160(b), gives the Board the power to issue a complaint only when "it is charged that any person has engaged in or is engaging in any ... unfair labor practice." The Supreme Court has interpreted this provision to allow the Board to prosecute an allegation not charged if it is "related to those alleged in the charge." *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 (1959). Subsequently, this court accepted the Board's position that § 10(b) allows the Board to pursue an uncharged or untimely charged allegation if it is "closely related" to a timely charged allegation, which question turns upon the examination of three factors: whether the two allegations (1) involve the same legal theory; (2) arise from the same factual circumstances or sequence of events; and (3) would elicit similar defenses. *See Drug Plastics & Glass Co. v. NLRB*, 44 F.3d 1017, 1020-21 (D.C. Cir. 1995) (uncharged allegation); *Lotus Suites, Inc. v. NLRB*, 32 F.3d 588, 590-91 (D.C. Cir. 1994) (uncharged allegation); *Ross Stores, Inc. v. NLRB*, 235 F.3d 669, 672 (D.C. Cir. 2001) (allegation in untimely charge).

The Board concedes that the Union did not charge the Hospital with an unfair labor practice involving the removal of the notice but argues that the removal was closely related to the allegation in the timely charge concerning the Hospital's interference with the distributions in March, 1997, and in a charge not otherwise at issue in this petition concerning a negative performance evaluation given to a certain nurse. We conclude that the removal of the notice was not legally or factually related to any charged allegation and that the Board therefore lacked authority to pursue a complaint about it.

As the Board observes, removal of the notice and the prohibition of distribution implicate the same section

of the Act, § 8(a)(1), but the specific legal basis for each allegation is different. As the Board itself held, the prohibition of distribution violated the employees' § 8(a)(1) right to distribute union literature in non-work areas, whereas the removal of the notice violated § 8(a)(1) only because the Hospital allowed comparable postings for other causes. *See Brockton Hosp.*, 333 N.L.R.B. No. 165 at 10-11.

Turning to the factual content of the respective allegations, we note that the distribution and removal incidents occurred five months apart, *cf. G.W. Galloway Co. v. NLRB*, 856 F.2d 275, 280-81 (D.C. Cir. 1988) (allegations one day apart not factually linked); and there is no indication that the employee who posted the notice participated in the distributions or that the supervisor who removed the notice in August was involved in stopping the distributions, *cf. Ross Stores*, 235 F.3d at 671-74 (same employee, different supervisor, no factual relatedness). As the Board points out, both incidents occurred as the Union was rallying its troops for contract negotiations, but "[t]he coincidence of ... two separate violations during the same organizing campaign does not of itself create a close factual relationship." *Id.* at 674. So, too, with separate alleged violations during the same pre-bargaining season. The Board's conclusion that the allegations are closely related because they both involve "issues of communications between the Union and unit members and among unit members," *Brockton Hosp.*, 333 N.L.R.B. No. 165 at 11, is pitched at too high a level of generality; two issues may involve such communications and yet be factually poles apart.

Finally, the Board argues that the Hospital's defense of its removal of the notice is similar to one of its defenses of the ban on distribution - namely, there were alternative channels of communication open to the Union

and the employees - and to one of its defenses of the negative performance evaluation - to wit, the Hospital had a non-discriminatory reason for its action. As to the former asserted similarity, it is a stretch to say that the Hospital relies upon the availability of "alternative channels of communication" in defense of its removal of the notice; in fact the Hospital's defense is that under their collective bargaining agreement nurses have no right to post notices on their lockers. Even if the Hospital could be said to raise alternative channel defenses to both allegations, however, the alternative channels are not the same, being the bulletin board as an alternative to the lockers and mail and other locations as alternatives to the vestibule. As to the latter claim of similarity, the Board does not even attempt to show that the non-discriminatory justifications offered by the employer in this case are in any way similar beyond being non-discriminatory, which does little to narrow the field.

III. Conclusion

The Hospital's petition for review is granted with respect to removal of the union notice but denied in all other respects. Accordingly, the Board's cross-petition for enforcement is granted except with respect to removal of the notice.
So ordered.

FILED
NOV 27 2002

(2)

No. 02-504

In the Supreme Court of the United States

BROCKTON HOSPITAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner, an acute care hospital, committed unfair labor practices by prohibiting its nurses from distributing literature to co-workers in the bargaining unit and by maintaining an overbroad policy prohibiting solicitation of employees and distribution of literature.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B13) is reported at 294 F.3d 100. The decision and order of the National Labor Relations Board (Pet. App. A1-A14, A45-A50) and the decision of the administrative law judge (Pet. App. A15-A45, A50-A51) are reported at 333 N.L.R.B. No. 165.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2002. The petition for a writ of certiorari was filed on September 25, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act (Act), 29 U.S.C. 157, guarantees employees the right "[to] join, or assist labor organizations * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 7 "necessarily encompasses" the right of employees "effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 491 (1978). Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce" employees in the exercise of Section 7 rights.

This Court has upheld the National Labor Relations Board's "general approach" to the regulation of employee solicitation and distribution of literature in health-care facilities. *Beth Israel Hosp.*, 437 U.S. at 507; *NLRB* v. *Baptist Hosp., Inc.*, 442 U.S. 773, 778-779 (1979). Under that general approach, a health care facility must permit employee solicitation and literature distribution during nonworking time in nonworking areas of a health-care facility unless the facility justifies a prohibition as necessary to avoid disruption of health-care operations or disturbance of patients. *Beth Israel Hosp.*, 437 U.S. at 507. The Board presumes, however, that a ban on distribution and solicitation in "immediate patient care areas" and a ban on distribution in work areas is justified. See *Baptist Hosp.*, 442 U.S. at 778-779; Pet. App. A5, A25-A26.

2. Petitioner is an acute care hospital in Brockton, Massachusetts. Pet. App. A16-A17, B2. Petitioner's registered nurses are represented by the Massachusetts Nurses Association (Union) for purposes of collec-

tive bargaining. *Id.* at A17, B2. A labor agreement between petitioner and the Union was set to expire on October 18, 1997. *Id.* at A17. In March 1997, the Union initiated a "safe care campaign" in order to prepare the nurses for upcoming contract negotiations and to educate them about adverse trends in the nursing profession—matters which the Union anticipated would be a subject of bargaining with petitioner. The Union's campaign included the distribution of literature by some of petitioner's nurses at the hospital. *Id.* at A17-A20, B2-B3.

The nurses, while off duty, distributed literature to other nurses in the bargaining unit as they entered and exited the hospital during shift changes. Pet. App. A19, B3. The distribution took place at three locations: in the vestibule at the front entrance, outside the rear entrance, and outside the emergency/outpatient entrance. *Id.* at A23, B3. The literature was offered only to bargaining-unit nurses and was not offered to patients, family members of patients, friends of patients, or visitors. *Id.* at A19, B3. The distribution occurred only one day per week, on Thursdays (the nurses' payday). *Ibid.*

The literature distributed by the nurses to their coworkers consisted of compilations of articles from nursing journals, newspapers, and magazines. Pet. App. A20, B2. The articles addressed such issues as the use of nonprofessional employees by hospitals to provide patient care formerly administered by registered nurses. *Ibid.* The articles bore headlines such as "A shortcut that killed a patient." *Id.* at A20-A21. None of the articles referred to petitioner but rather addressed occurrences at other hospitals. *Ibid.*; *id.* at B3. On multiple occasions, petitioner ordered the nurses to stop distributing the literature. *Id.* at A20, B3.

3. Acting on charges filed by the Union, the Board's General Counsel issued a complaint alleging that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by prohibiting its employees from distributing literature at the hospital. Pet. App. A15-A16.

a. After a hearing, an administrative law judge (ALJ) sustained that allegation. Pet. App. A23-A29, A41. The ALJ concluded that petitioner's ban on the nurses' distribution of literature in the vestibule at the front entrance, outside the rear entrance, and outside the emergency/outpatient entrance was not presumptively lawful, because none of those locations is reasonably characterized as an "immediate patient care area" or a work area. *Id.* at A28-A29.

The ALJ also rejected petitioner's contention that it was nonetheless justified in prohibiting the nurses' distribution of literature because of the potential effect on the delivery of health care. Pet. App. A21-A23. In support of its proffered justification, petitioner presented the testimony of two staff physicians and a former nurse, who stated that, if patients or their families saw the literature distributed by the nurses, they "could become upset and anxious and it could undermine the trust that should exist between a patient and the medical staff treating the patient." *Id.* at A21. The ALJ found that concern insufficient to justify banning distribution of the literature because "there was not a shred of evidence that any patient or family member saw any of th[e] literature." *Id.* at A22. The ALJ found that petitioner had received "no complaints about the literature from any patient or family member of a patient" (*id.* at A22-A23) and that there was "no evidence that any patient was ever disturbed or inconvenienced by the distribution of th[e] literature" (*id.* at A23).

b. The Board, with one member dissenting, affirmed the ALJ's decision. Pet. App. A1, A46 n.5. The Board further found that petitioner's policy banning employee solicitation and literature distribution was unlawful insofar as it prohibited distribution of literature or solicitation in all "halls and corridors used by patients." *Id.* at A4. The Board explained that those locations are not all necessarily immediate patient care areas (where both distribution and solicitation may presumptively be banned) or work areas (where distribution may presumptively be banned). *Ibid.*; *id.* at A46-A47 n.11.

The Board declined to abandon "well-established precedent" in favor of a new rule proposed by the dissenting Board member, under which a hospital's ban on distribution of literature and solicitation "in areas where patients, their families, and visitors spend a substantial amount of time" would be presumed lawful. Pet. App. A4-A6; see *id.* at A8-A9 (Member Hurtgen, dissenting in part). Although the Board agreed with the dissenting Board member that "an 'atmosphere of serenity' is a desirable goal in the hospital setting," the Board majority could find "no support in the record of this case for departing from" settled law. *Id.* at A5-A6.

To remedy petitioner's unfair labor practices, the Board ordered petitioner to cease and desist from "[r]efusing to permit employees to distribute literature concerning terms and conditions of employment to other employees in nonworking, nonpatient care areas of the hospital." Pet. App. A42; see *id.* at A7. The Board also ordered petitioner to rescind the unlawful portion of its policy prohibiting employee solicitation and literature distribution. *Id.* at A8.

4. The court of appeals enforced the Board's order in relevant part. Pet. App. B2, B13. The court rejected petitioner's "primary contention" that "prohibiting

distribution in the vestibule was necessary to avoid disturbing patients." *Id.* at B4. Although the court agreed with petitioner that it "had to show only a likelihood of, not actual, disruption or disturbance," the court found that "substantial evidence supports the Board's decision that [petitioner] did not meet even this standard." *Id.* at B5-B6. The court explained that, although "[petitioner's] experts testified that if patients saw or heard about the content of the literature they would be upset," petitioner "presented no reason * * * to believe patients were likely to learn of the content of the literature." *Id.* at B6.

The court of appeals also rejected petitioner's argument that the vestibule is a work area, and thus that petitioner was presumptively entitled to prohibit the distribution of literature there. Pet. App. B7. Rather, the court concluded that, under settled Board precedent, petitioner's vestibule is not a work area merely because "employees assist discharged patients through the vestibule, janitors clean the area, and a guard is sometimes stationed there." *Ibid.*

The court of appeals further rejected petitioner's claim that the literature disparaged petitioner's services and that its distribution was therefore unprotected under the reasoning of *NLRB* v. *Local Union No. 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953). Pet. App. B8. The court of appeals explained that *Jefferson Standard* is inapposite, and no concern of disparagement was presented by the nurses' activities, because the literature did not refer to petitioner and was not distributed to the public. *Id.* at B8-B9.

Finally, the court of appeals rejected petitioner's contention that the Board was required to adopt a new presumption permitting hospitals to prohibit solicitation and distribution in any area "to which patients,

their families and visitors have regular access." Pet. App. B9. The court explained that the Board "clearly did appreciate its continuing duty to keep current its approach to distribution and solicitation in hospitals." *Ibid.* The court found that, after discharging that duty, the Board "simply found 'no support in the record for departing from * * * well-settled principles.'" *Ibid.* (quoting Pet. App. A5).

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of another court of appeals. This Court's review is therefore not warranted.

1. Petitioner incorrectly contends (Pet. 12-16) that the Board was obligated in this case to abandon its long-standing approach to employee solicitation and literature distribution in health care facilities and to adopt instead a rule under which employers would presumptively have authority to prohibit distribution and solicitation "in all areas of a hospital's premises to which patients and their families or friends have regular access." Pet. 15. As the court of appeals held, petitioner presented no reason for the Board to revise its current approach, which this Court has previously approved. See Pet. App. B9.

a. This Court has explained that, "as in many other contexts of labor policy," the "ultimate problem" facing the Board, when exercising its authority "to fashion generalized rules in light of its experience * * * involving hospitals," is "the balancing of the conflicting legitimate interests." *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500-501, 507 (1978) (internal quotation marks omitted). As discussed above, the Court has upheld the Board's current approach to solicitation and distribu-

tion, under which a health care facility is presumptively entitled to prohibit solicitation and distribution in "immediate patient care areas" and to prohibit distribution in work areas. See p. 2, *supra*.

The Court has also explained that, in striking the appropriate balance among competing interests, the Board bears "a heavy continuing responsibility to review its policies concerning organizational activities in various parts of hospitals." *Beth Israel Hosp.*, 437 U.S. at 508 (internal quotation marks omitted). Accordingly, the Court has indicated that the Board "should stand ready to revise its rulings if future experience demonstrates that *the well-being of patients is in fact jeopardized.*" *Ibid.* (internal quotation marks omitted) (emphasis added). Nonetheless, in the health-care field, as in other labor contexts, "[t]he function of striking th[e] balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the [Board], subject to limited judicial review." *Id.* at 501 (quoting *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957)).

Here, as the court of appeals correctly concluded (Pet. App. B9), the Board, heeding this Court's admonition, "clearly did appreciate its continuing duty to keep current its approach to distribution and solicitation in hospitals." However, petitioner failed to provide evidence to the Board demonstrating that "the well-being of patients is in fact jeopardized" by the Board's current approach. *Beth Israel Hosp.*, 437 U.S. at 508. The Board was therefore justified in declining to revise extant law in this case. See Pet. App. A5-A6, B9.

b. Before the Board, petitioner's expert witnesses testified only that "if patients or their families saw [the distributed] articles they could become upset and

anxious." Pet. App. A21, B5. However, as the court of appeals found (*id.* at B5-B6), substantial evidence in the record supports the Board's determination that this testimony does not demonstrate "a likelihood of * * * disruption or disturbance," because petitioner came forward with "no reason * * * to believe patients were likely to learn of the contents of the literature." Given that evidentiary record, the Board was not required in this case to hold that its current rules "jeopardize[]" patient well-being (*Beth Israel Hosp.*, 437 U.S. at 508), much less to adopt the dramatic shift in approach proposed by petitioner.

Petitioner incorrectly asserts (Pet. 6-11) that its proposed rule is necessary because the record expert testimony and certain "other available data" (Pet. 7-8) demonstrate that "the population admitted to acute care community hospitals in this day and age is much more acutely ill, and is allowed fewer days of in-patient treatment which naturally results in discharged patients being sicker when discharged." Pet. 11. Even if we assume those facts to be correct, they do not require the Board to abandon its current approach. Under current law, a hospital can prohibit solicitation and distribution in any area of the facility if the hospital has reason to believe that such activity is likely adversely to affect patient well-being. See *Beth Israel Hosp.*, 437 U.S. at 500, 507; *Baptist Hosp.*, 442 U.S. at 781 n.11.

Petitioner also errs in contending (Pet. 14-15) that its proposed broad presumption is necessary because the Board's interpretation of what constitutes an "immediate patient care area" has remained "remarkably static" and fails to recognize that "[p]atient care is a much broader concept than discreet [*sic*] medical procedures or treatments." When the Board first began regulating union activity in private hospitals, the Board

limited the concept of "immediate patient care areas"—where solicitation and distribution may presumptively be prohibited—to patients' rooms, operating rooms, and treatment rooms. See *Baptist Hosp.*, 442 U.S. at 781 n.10. Subsequently, however, the Board, based on "further experience with hospital no-solicitation rules," has extended the concept (and the attendant presumption) to "halls and corridors adjacent to" those areas. *Intercommunity Hosp.*, 255 N.L.R.B. 468, 472 (1981); see *Doctors' Hosp. of Staten Island, Inc.*, 325 N.L.R.B. 730, 735 (1998) (waiting rooms adjacent to immediate patient care areas). Moreover, in other locations where the presumption does not apply, the Board has readily allowed hospitals to justify prohibitions on solicitation. See, *e.g.*, *Presbyterian/St. Luke's Med. Ctr.*, 258 N.L.R.B. 93, 98 (1981) (hallways, elevators, and stairways "utilized for the movement of patients and emergency equipment"), enforced, 723 F.2d 1468 (10th Cir. 1983). In light of the Board's decisions, petitioner is unpersuasive in contending that patient well-being can be protected only by a broad rule presumptively allowing hospitals to ban solicitation and distribution wherever "patients and their families or friends have regular access." Pet. 15.

2. Petitioner also errs in contending (Pet. 16-17) that the court of appeals' decision required petitioner to demonstrate "actual harm" (Pet. 16) to patients in order to justify a ban on literature distribution and that the decision is therefore inconsistent with *Baptist Hospital.* On the contrary, the court of appeals expressly stated that petitioner "had to show only a likelihood of, not actual, disruption or disturbance." Pet. App. B5. That test fully accords with this Court's precedent. See *Baptist Hosp.*, 442 U.S. at 781 n.11 (relevant inquiry is whether solicitation is "likely" to disrupt patient care or

disturb patients); *Beth Israel Hosp.*, 437 U.S. at 500 (relevant inquiry is whether patient care is "likely" to be disrupted).

3. Finally, petitioner is also mistaken in contending (Pet. 18-22) that it was free to prohibit its nurses from distributing the literature at issue because the literature was not protected by Section 7 of the Act. Section 7 guarantees employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. Employers and unions are obligated to bargain in good faith "with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. 158(d). Here, the Board reasonably concluded that "the literature distributed at Brockton Hospital concerned terms and conditions of employment" and was "encompass-[ed]" by the "mutual aid or protection" clause of Section 7. Pet. App. A24-A25.

As the Board found, the literature was distributed for the purpose of "educat[ing] the nurses in the [bargaining] unit about trends in the nursing field and also to prepare the nurses for the upcoming negotiations for a new contract later in the year." Pet. App. A18; see *id.* at A19-A20. The Union believed that issues such as staffing shortages, mandatory overtime, and the use of nonprofessional staff to perform work traditionally done by nurses "would be brought up at upcoming bargaining sessions for a new collective-bargaining agreement" with petitioner. *Id.* at A18. The distributed literature addressed precisely those issues, which are "matters of working conditions critical in importance to nurses." *Id.* at A25; see *id.* at A20.

There is no merit to petitioner's contention (Pet. 19-21) that the literature was unprotected "disparagement" of its services under *NLRB* v. *Local Union No.*

1229 (Jefferson Standard Broadcasting Co.), 346 U.S. 464 (1953). In *Jefferson Standard*, this Court concluded, in agreement with the Board, that employees had engaged in unprotected conduct when, during an impasse in negotiations, they "sponsored or distributed 5,000 handbills making a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." *Id.* at 471.

As the court of appeals correctly concluded (Pet. App. B8-B9), *Jefferson Standard* is inapposite. The articles distributed by the nurses here did not disparage petitioner's services but rather addressed mishaps at *other* hospitals. *Id.* at B8. Moreover, to the extent that the articles could be understood to imply that similar problems might occur if petitioner downsized its nursing staff, such an inference could not have been drawn by the general public, because the articles were distributed only to nurses in the bargaining unit. *Id.* at B8-B9. In those circumstances, the court of appeals properly concluded that "the concern underlying *Jefferson Standard*, that activity 'reasonably calculated to harm the company's reputation and reduce its income' rather than further collective bargaining be excluded from the protection of the Act, simply is not present." *Id.* at B9 (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 02-504

In The

Supreme Court of the United States

BROCKTON HOSPITAL,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD and
MASSACHUSETTS NURSES ASSOCIATION

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The
District Of Columbia Circuit

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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RULES 14.1 AND 29.6 STATEMENT

Petitioner is Brockton Hospital, a non-profit corporation under Massachusetts law which operates an acute-care community hospital in Brockton, Massachusetts. The National Labor Relations Board is the federal governmental agency charged with enforcement of the National Labor Relations Act, 29 U.S.C. sec. 150 et seq. (the "Act"). The Massachusetts Nurses Association is a labor organization under the Act and representative of the registered nurses employed by the Petitioner; it was the charging party before the Board and an intervenor in the Circuit Court below.

Petitioner has no parent companies nor does any publicly held company own more than 10% of petitioner's stock.

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442 U.S. 773, 99 S.Ct. 2598 (1979) Passim

PETITIONER'S REPLY TO THE BOARD'S OPPOSITION

1. The So-Called "Safe Care Campaign"

The Board suggests in its brief that the purpose of the so-called "Safe Care Campaign" literature distribution at the entrances to Brockton Hospital was to prepare for contract negotiations which would not even come up for another six months. Opp. Brf. At 3. Indeed, that is what MNA witnesses testified to, testimony directly contrary to the MNA's own internal documents which were in evidence but ignored by the ALJ, the Board, and the lower Court. For example, J.App. , Vol. II at 845, a document drafted and distributed by the MNA, reads in relevant part:

> . . . the Massachusetts Nurses Association has launched the "Statewide Campaign for Safe Care," involving concerned nurses and consumer advocates from throughout the Commonwealth. The goal of the campaign is to inform consumers and policymakers about how staff changes in hospitals, long term care facilities and other health care settings are limiting patient's [sic] access to quality nursing care that is essential to adequate prevention, recovery and treatment of illness and injury.

The Union was elated that the literature distribution "became very visible to the public eye." J.App., Vol. II at 845-908.

The Board also suggests that the literature was distributed only at the three entrances, again contrary to the record evidence. Opp. Brf. at 3. Off-duty nurses

distributed multiple copies of the literature to their co-workers, to nurses' mailboxes and in the Hospital cafeteria. J.App., Vol. I at 239, 244-245; Vol. II at 1048-49. Hospital personnel found the literature in various locations throughout the Hospital over the course of the MNA's campaign, a fact also ignored by the ALJ, the Board and the lower Court. A 22-23; J.App., Vol. I at 430, 539-540. The Hospital had to develop and implement a communications plan to share with patients what was going on because patients and families had been asking what was going on. J.App., Vol. I at 430.

It is nonsense that this activity was to prepare for negotiations and nonsense that it was not in context disparaging of the Hospital. Any nurse arriving for work being handed a copy of material with headlines about patients dying is not going to associate that material with collective bargaining or any protected activity.

Moreover, even if no patient was ever handed one of the handouts, patients and families were asking questions about what was going on, and the union itself was happy that their activities "became very visible to the public eye". J.App., Vol. II at 1050, 1052.

2. "Work" Areas and "Immediate Patient Care" Areas

One aspect of the Hospital's Petition is the Board's finding that its distribution and solicitation policy is overbroad because it barred such activity in "halls and corridors used by patients." Opp.Brf. at 5. The Board's rationale was that some of those areas may not meet the Board's narrow definitions of either an "immediate patient care area" or a "work area". *Id.* The Board fails to explain, however, how corridors regularly used by patients are not inherently a work area in an acute care hospital.

The Hospital suggested a rule making presumptively lawful a ban on solicitation and distribution in areas "where patients, their families, and visitors spend a substantial amount of time." *Id.* This does not appear unreasonable in an acute care hospital setting generally, but particularly where as previously noted patients are sicker and stays are shorter than they were in 1978. Pet. at 6-8. The Board, after all, does not run a Hospital.

The Hospital's suggested rule certainly appears more consistent with this Court's admonition in *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 790 n. 16, 99 S.Ct. 2598 (1979):

> The Board, in reviewing the scope and application of its presumption, should take into account that a modern hospital houses a complex array of facilities and techniques for patient care and therapy that defy simple classification. Patients not undergoing treatment at the moment are cared for in a variety of settings -- recovery rooms, intensive-care units, patients' rooms, wards, sitting rooms, and even corridors, where patients are often encouraged to walk, or to visit with their families.[1]

In fact, the majority in *Baptist Hospital* stated that

> the experience to date raises serious doubts as to whether the Board's interpretation of its present presumption adequately takes into account the medical practices and methods of treatment incident to the delivery of patient-care services in a modern hospital.

3. "Actual" Versus "Likelihood" Of Harm To Patients

According to this Court, a hospital bears the burden of proving only that "solicitation *may* adversely affect patients." *Baptist Hospital.*, 442 U.S. at 782 (emphasis supplied). This standard does not require the Hospital to wait until a patient suffers actual harm or is actually handed a copy of the distribution. Yet, the standard the Hospital effectively was held to in this case was having to prove actual harm to patients, regardless of the rhetorical legerdemain employed by the lower Court and the Board in its Opposition Brief.

The evidence was that there was distribution at three entrances, to employee mailboxes, to employees in the cafeteria, and that distributed materials were found discarded in areas accessible to patients and families. The evidence was also that the distribution generated so much interest on the part of patients and families that the Hospital was forced to develop and implement a communications plan to deal with it.

Yet with this level of distribution and patient and public awareness on the record, the lower Court somehow found that the Hospital had not demonstrated a likelihood of harm because there was no evidence that any patient actually saw or received the material. If this evidence does not demonstrate a likelihood of harm, then it is because the actual standard applied was higher, that of actual harm.

Baptist Hospital, 442 U.S. at 790.

The Petitioner certainly agrees, and this statement unfortunately is as true today as it was in 1978.

There is no way the Hospital could adduce more proof of a likelihood of harm without showing actual receipt by patients of the distributions. But why should the Hospital have to wait for actual receipt? Why is any decent Hospital administrator going to stand around and wait until a patient is injured or harmed before banning the distribution of literature with headlines about people dying in hospitals? The Board's and lower Court's position simply is absurd and ignores this Court's discussion in *Baptist Hospital*.

Finally, as noted above, even if no patient was ever handed one of the handouts, patients and families were asking questions about what was going on, and the union itself was happy that their activities "became very visible to the public eye". J.App., Vol. II at 1050, 1052.

Conclusion

For all the foregoing reasons, Petitioner respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted.

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